Post-conflict reconciliation in Sri Lanka: A socio-legal analysis

by

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Abstract

The objective of this thesis is to address the reconciliation problem in Sri Lanka. It addresses two research questions: (a) whether the transitional justice mechanism proposed by the international community can help build reconciliation in Sri Lanka? and (b) what alternative mechanisms can be implemented in support of these mechanisms to reconcile the divided communities? Sri Lanka ended 30 years of civil war in 2009. However, a successful reconciliation mechanism has not yet been implemented. Currently, Sri Lanka experiences significant ethnic division and this may lead to the recurrence of the civil war. The international community proposed the implementation of mechanisms for reconciliation including truth commissions and hybrid courts. The thesis argues that these classical mechanisms, even though useful, are not sufficient. Hence, an additional mechanism is required to address the Sri Lankan reconciliation problem.

To address the identified research questions, this thesis uses three main concepts: Third World Approaches to International Law (TWAIL), structural violence and the capabilities approach. TWAIL demonstrates that the third world people's perspective must be represented in the reconciliation mechanisms. From a third world people's perspective, increased structural violence as a result of the civil war is the key factor that prevents reconciliation. This thesis defines structural violence as the violence arising out of particular social or institutional structures, which results in providing privileges to one communal group to the detriment of others, creating antipathy within the disadvantaged group. The thesis argues that any mechanism for reconciliation should address the problem of increased structural violence. To address increased structural violence, the thesis suggests the use of the capabilities approach as developed by Amartya Sen.

The capabilities approach is designed to enhance wellbeing and the quality of life by considering the opportunities of the people, individual abilities, available resources and personal values. It suggests that the victims of the civil war should be included in domestic political and economic mechanisms. The current Sri Lankan political situation does not allow minority groups, such as the Tamils, to effectively participate in politics. One way of addressing this problem is the implementation of an effective power sharing mechanism. The

thesis introduces three reform proposals: (a) to elect a Governor from each Provincial Council; (b) to implement national government consultative committees and (c) to implement a permanent minority seat to represent the Tamils in the government.

The thesis argues that as a result of the civil war structural violence in economic terms has increased. To address this problem the thesis introduces reform proposals to ensure war-victims' inclusion in the economic process by: (a) enacting anti-discrimination laws (b) reducing the number of military personnel from the North and the East (c) developing the capabilities and skills of the individuals and (d) allowing suitable credit facilities. These reform proposals explicitly address the key factors that restrict minority Tamils' inclusion in the domestic economy. These proposals come within the capabilities approach which focuses on enhancing the wellbeing and quality of life of the people.

Acknowledgements

Today, I look back into the past two years of my research journey. The journey was rough but was amazing. A few individuals came across to save me from the rough times. This acknowledgment is to show my gratitude to those few individuals who so generously helped me throughout this journey.

I thank my mother, the strongest woman I have ever seen, who always stand by my side. She believed in me when I cannot believe in myself and encouraged me every time I was down. Thank you, Amma for everything!

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I dedicate this thesis to Dennis Joel and Ann Hegarty - two amazing humans I have ever met.

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Chapter 1 – Introduction

Executive summary

Sri Lanka ended 30 years of civil war in 2009.[1] The main cause of this civil war was the ethnic tension between the Sinhalese and Tamils.[2] Currently, ethnic tension continues in Sri Lanka.[3] Ethnic groups are not reconciled, and an effective transitional justice mechanism has not been implemented. The current situation may lead to the recurrence of the civil war. The international community made several attempts and suggested several means to reconcile the parties.[4] Despite these attempts, Sri Lanka shows little progress in reconciling the divided communities.[5] To date, a number of regional human rights mechanisms have been established including the African Union,[6] the European Court of Human Rights,[7] and the inter-American human rights system.[8] While South East Asian countries have adopted a human rights declaration, a regional human rights mechanism has not been established in other parts of Asia and the Pacific.[9] Intervention under the umbrella of regional human rights mechanisms can reduce the risk of human rights violations in conflicts. For instance, the threat to human rights posed by the Senegalese civil war in the 1980s was limited by the intervention of the African Union.[10] Unlike Senegal, Sri Lanka is not a party to a regional human rights mechanism and therefore no regional partners intervened to prevent human rights violations during the decades of the civil war.

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[1] Miguel Candela Zigor Aldama, *The Scars of Sri Lanka's civil war,* (6th June 2016) Al Jazeera < https://www.aljazeera.com/indepth/inpictures/2015/12/scars-sri-lanka-civil-war-151221062101569.html>.

[2] Council on Foreign Relations, *The Sri Lankan Conflict* (15th September 2018) Council on Foreign Relations, < https://www.cfr.org/backgrounder/sri-lankan-conflict>.

[3] Chapter 1 page 4 of this thesis makes a comprehensive analysis of this claim.

[4] Since 2009 until 2015 the international community made several attempts to implement a transitional justice mechanism. However, the Sri Lankan government did not positively respond to these proposals. A comprehensive analysis of this claim is made at page 5 of this chapter.

[5] The Indian Express, *UN rapporteur unhappy over Sri Lanka's reconciliation progress*, (15th September 2018) The Indian Express <https://indianexpress.com/article/world/un-rapporteur-unhappy-over-sri-lankas-reconciliation-progress-4751007/>.

[6] Article 18, *Constitutive Act of the African Union*, (entered into force 11 July 2000).

[7] Section 3, *Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 as amended by Protocols No. 11 and No. 14*, ETS No 5, (entered into force 1 June 2010).

[8] *Charter of the Organization of American States 1967*, Chapter IV.

[9] Silvia Atanassova Croydon, 'Towards a regional human rights mechanism in the Asia Pacific? Exploring the potential of the Asia Pacific Forum' (2014) 27 (2), *The Pacific Review* 289, 290.

[10] Charles Chernor Jalloh, *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law*, *(*Cambridge University Press, 1st ed, 2013) 8.

This thesis questions whether the classical legal framework for reconciliation[11] can adequately address the Sri Lankan problem and examines an alternative solution to supplement the classical mechanisms. It will be shown that, even though the classical mechanisms are essential for reconciliation, these mechanisms are not sufficient. In the absence of a regional human rights mechanism this is an essential step.

This chapter will first introduce the Sri Lankan case study. Next, it will introduce the research question and justify the rationale for this research. This chapter will also briefly describe the classical transitional justice mechanisms and will define the term reconciliation. Next, this chapter will introduce the main concepts used in the thesis, namely, Third World Approaches to International Law (TWAIL), structural violence and the capabilities approach. After explaining this conceptual framework, the chapter will introduce the methodology utilised in this research project. The chapter will end with a brief conclusion.

1.1 Background to the study

The population of Sri Lanka has always been heterogeneous[12] with principal divisions between Sinhalese, Tamil and Muslim.[13] The ethnic division is intensified by the Sinhalese Buddhist claim that they are the earliest settlers of Sri Lanka. Despite this multi-ethnic background, Buddhism remains the main religion in Sri Lanka and is constitutionally

[11] For the purpose of this research the classical legal framework for reconciliation is defined as the transitional justice mechanisms developed by the international community to reconcile divided communities in the past. This includes hybrid courts, truth commissions and reparation programs. (See, United Nations Human Rights Office of the High Commissioner, *Transitional Justice and Economic, Social and Cultural Rights* (United Nations Publication 1st ed, 2014) 1-8.

[12] Deborah Winslow and Michael D Woost, *Economy Culture and Civil War in Sri Lanka* (Indiana University Press, 1st edition, 2004) 4.

[13] When the British ruled Sri Lanka, (1815 – 1948) the population was classified into three races: the Sinhalese, the Tamils and the Muslims and considered them to be fixed entities.(S.I. Keethaponcalan, *Conflict and peace in Sri Lanka: Major Documents with and introductory Note on each Document* (Kumaran Book House, 1st ed, 2009) *and* Sehar Mushtaq, 'Identity Conflict in Sri Lanka: A Case of Tamil Tigers' (2012) 2 (15), *International Journal of Humanities and Social Sciences*, 202) These races had their own quasi biological differences in terms of their culture, aptitudes, character and appearance. The significant caste differences which were rooted into the Sri Lankan pre-British society was uprooted by the British. Instead of the caste, the British gave significance to the language. As a result, the division between the Tamils and the Sinhalese was heightened. The Muslims, who share similar language with the Tamil, also play a significant role in the Sri Lankan politics. Due to this division of population in terms of ethnicity, it has become apparent that a reconciliation mechanism should necessarily deal with the ethnic division and their specific socio-cultural factors.

protected.[14] While equality of religion is ensured by the constitution this privilege has not been given to any other religion.[15]

Tamil minority groups experienced discrimination, violence and tension for decades prior to the start of the civil war in the late 1970s.[16] Amongst many, three main events resulted in the damaged relationships between the Tamil and Sinhalese people: (a) enacting the Official Language Act in 1956, (b) constitutional primacy given to Buddhism and the Sinhalese language by the 1972 First Republican Constitution, and (c) youth unrest in 1978.

The Official Languages Act of 1956 played a major role in the socio-cultural events in Sri Lanka that lead to the emergence of a violent civil war.[17] Hence, it is worthwhile looking at the background that led to the enactment of this legislation. After colonisation, the British implemented English as the main working language in Sri Lanka.[18] At the time, both the Tamil and Sinhalese leaders negotiated with the British to impose Sinhalese and Tamil as working languages.[19] In 1945, three years before independence, JR Jayawardena, a member of the State Council proposed to recognise both Tamil and Sinhalese as national languages in Sri Lanka.[20] This was opposed by other Sinhalese politicians.[21] After independence, the official language issue was used by the newly established Sri Lanka Freedom Party as a tool to win the majority Sinhalese votes. For instance, S.W.R.D. Bandaranaike, leader of the party in 1956 claimed that, "the Tamils with their much more developed culture will dominate us.

[14] Article 9 of the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka provides: "The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha *Sasana*, while assuring to all religions the rights granted by Articles 10 and 14(1)(e)."
[15] Article 10 of the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka provides: "Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice".
[16] Johan Galtung, 'Power Sharing as Peace Structure: The Case of Sri Lanka' (Working Paper No. 2, Institute for Integrative Conflict Transformation and Peacebuilding 2005) 6; Mathijs van Leeuwen, *Partners in Peace – Discourses and Practices of Civil Society Peacebuilding* (Ashgate Publishing Limited, 1st edition 2009).
[17] Neil Devotta, 'From Ethnic Outbidding to Ethnic Conflict: the Institutional Bases for Sri Lanka's Separatist War' (2005) 11(1) *Journal of Nations and Nationalism*, 141, 149, Sandagomi Coperahewa, 'The Language Planning Situation in Sri Lanka' (2009) 10 (1) *Current Issues in Language Planning* 69, 111, David Hayes, 'Duty and Service: Life and Career of a Tamil Teacher of English in Sri Lanka' (2010) 44 (1), *TESOL Quarterly*, 60.
[18] Janina Brutt-Griffler, 'Class, Ethnicity, and Language Rights: An Analysis of British Colonial Policy in Lesotho and Sri Lanka and Some Implications for Language Policy' (2002) 1(3), *Journal of Language, Identity, and Education*, 207, 230.
[19] Sandagomi Coperahewa, 'The Language Planning Situation in Sri Lanka' (2009) 10 (1) *Current Issues in Language Planning* 69, 79-80.
[20] Ibid, 111.
[21] Ibid, 79.

Tamil even as a regional language is not desirable as Tamils are insatiable and they will not rest until the whole of Ceylon is given parity."[22]

In 1956, Premier Bandaranaike enacted the Official Languages Act making Sinhalese the official language in Sri Lanka. This marked the beginning of official discrimination against the minority Tamils by the majority Sinhalese.[23] As part of the process, several discriminatory administrative decisions were made by the Premier. For instance, Bandaranaike's Cabinet categorized public servants as *old entrants* and *new entrants.* It was mandatory for the new entrants to pass a proficiency test in Sinhala.[24] This was clearly aimed to limit the number of Tamils in the Sri Lankan public service.[25] This was later followed by several other decisions that restricted the rights and privileges of minority Tamils including publishing the government Gazette in Sinhala, issuing the departmental circulars in Sinhala and franking the official letters in Sinhala. [26]

Minority Tamils were shocked and demanded to end these discriminatory practices. In order to control the Tamil uprisings, Bandaranaike enacted the Tamil Language (Special Provisions) Act in 1958 declaring Tamil language as an official language in the North and the East where the majority of Tamil speakers were living.[27] As a reaction to this initiative, Bandaranaike was killed by a Buddhist monk in 1959.[28]

These discriminatory actions led to the violence between Sinhalese and Tamils that ultimately resulted in a lengthy civil war. Civilians belonging to every ethnicity suffered from the Sri Lankan civil war. News reports indicate that nearly 100,000 people were killed as a result of the civil war.[29] These reports indicate that the impact of the last few months of the civil war (March to May 2009) was severe. During this period approximately 40,000 Tamil

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[22] Ibid.
[23] Sabina Martyn, 'In Post-Conflict Sri Lanka, Language is Essential for Reconciliation" The Asia Foundation, <https://asiafoundation.org/2013/01/16/in-post-conflict-sri-lanka-language-is-essential-for-reconciliation/.>
[24] Sandagomi Coperahewa, above n 19.
[25] Ibid.
[26] Sabina Martyn, above n 23.
[27] Ibid.
[28] Janaka Perera, "Assassination of a Prime Minister – S.W.R.D. Bandaranaike", *Asian Tribune*, (16/01/2013) https://asiafoundation.org/2013/01/16/in-post-conflict-sri-lanka-language-is-essential-for-reconciliation/.
[29] Al Jazeera, *Sri Lanka starts count of civil war dead* (28th November 2013) Al Jazeera America < http://america.aljazeera.com/articles/2013/11/28/sri-lanka-startscountingthecivilwardead.html> and AFP, *Sri Lanka civil war: Reconciliation efforts slammed on anniversary of seven-year conflict* (18th May 2016) ABC News < http://www.abc.net.au/news/2016-05-18/sri-lanka-reconciliation-effort-slammed-on-war-anniversary/7425636>.

civilians were killed.[30] Both the Sri Lankan government and international community sought to address this problem diplomatically. Ceasefire agreements implemented in 2001 and 2002 failed and the war continued until the defeat of the Tamil Tigers in May 2009.

When armed violence ended in 2009, Sri Lanka entered the post-conflict phase with the central challenge of reconciling the divided parties. For eight years, Sri Lanka struggled in this mission but until now ethnic tension is high, and parties have not been reconciled.[31] The conduct of the previous Sinhalese majority government (2005-2015) showed its reluctance to accept the Tamil minority.[32] The victory parades displayed largely Sinhalese military against the Tamils.[33] Tamils were also banned from commemorating rebels who died in the conflict.[34] The new government which came to power in 2015, following pressure from the international community, allowed such commemorations with some restrictions.[35] However, post-conflict ethnic tension continues in Sri Lanka. For instance, in April 2012, hard-line Buddhists who were followed by Buddhist monks attacked a Hindu Temple in Dambulla demanding the site to be demolished.[36] Also, Kumar -a Sri Lankan Tamil who sought refugee status in Australia, in his visit to Sri Lanka experienced severe torture and violence by the Sinhalese military forces.[37] It is reported that he was beaten heavily – his back was beaten 'with a scalding bar'.[38] Several similar claims were made throughout the post-conflict years.[39] Tamils also continued to live under majority Sinhalese dominance.[40] For this reason, in post-conflict Sri Lanka, Tamils live in fear and despair.

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[30] Ibid.

[31] United Nations Human Rights Office of the High Commissioner, *Sri Lanka: slow progress on crucial justice and reconciliation – UN report,* United Nations Human Rights Office of the High Commissioner < https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21278&LangID=E>

[32] AFP, *Sri Lanka civil war: Reconciliation efforts slammed on anniversary of seven-year conflict* (18th May 2016) ABC News < http://www.abc.net.au/news/2016-05-18/sri-lanka-reconciliation-effort-slammed-on-war-anniversary/7425636>.

[33] AFP, *Sri Lanka civil war: Reconciliation efforts slammed on anniversary of seven-year conflict* (18th May 2016) ABC News < http://www.abc.net.au/news/2016-05-18/sri-lanka-reconciliation-effort-slammed-on-war-anniversary/7425636>.

[34] Shihar Aneez and Ranga Srilal, *Tamils say barred from commemorating war dead, Sri Lanka denies* (19th May 2014) Reuters < https://www.reuters.com/article/us-sri-lanka-war-celebrations-idUSBREA4H09B20140518>.

[35] Quintus Colombage and Niranjani Roland, *Sri Lanka Tamils openly remember war dead- with restrictions* (19th May 2015) UCA News < https://www.ucanews.com/news/sri-lanka-tamils-openly-remember-war-dead-with-restrictions/73614>.

[36] BBC News, *Sri Lankan Muslims strike over Dambulla mosque* (26th April 2012) BBC News < https://www.bbc.com/news/world-asia-17852900>.

[37] Michael Gordon, *Scarred by Sri Lankan torture* (24th April 2013) Sydney Morning Herald, < https://www.smh.com.au/politics/federal/scarred-by-sri-lankan-torture-20130424-2if16.html>.

[38] Ibid.

[39] Ibid.

Communal violence against Muslims has also continued in the post-conflict Sri Lankan society. For instance, in January 2013, hard-line Buddhist monks attacked a Muslim-owned slaughterhouse.[41] In June 2014, Buddhists attacked Muslims in Aluthgama killing at least three Muslims and leaving more than 78 seriously injured.[42] The most serious event, the Kandy incident, happened in March 2018. Several riots and arson attacks took place in this area causing deaths and injuries. A curfew was imposed,[43] and a state of emergency was declared for the first time after the end of the civil war in Sri Lanka.[44]

Social media posts and personal communications to the author demonstrate that the ethnic tension in Sri Lankan society is comparatively high. The above situations indicate that the Sri Lankan Muslims who did not take part in the decade-long civil war are now party to the ethnic tension. Hence, different ethnic communities live in fear and despair.[45] As a result, the current situation in Sri Lanka could lead to a resumption of the civil war. This situation emphasizes the importance of introducing a successful reconciliation mechanism.

1.2 Research Question

The international community made several attempts to implement a reconciliation mechanism in Sri Lanka. The umbrella institutions of the United Nations, including the Security Council, the United Nations Development Program (UNDP) and the United Nations High Commissioner for Refugees (UNHCR) proposed several mechanisms in support of the reconciliation in Sri Lanka. States from the West made recommendations in support of the Sri Lankan reconciliation process. For instance, immediately after the end of the civil war in 2009, Stephen Rapp – The State Department of the United States' top war crimes official - urged the Sri Lankan government to conduct a genuine investigation against the alleged war

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[40] Shreerupa Mitra-Jha, *Tamils continue to face racial discrimination in Sri Lanka, says UN Committee post review* (25th August 2016) First post < https://www.firstpost.com/world/tamils-continue-to-face-racial-discrimination-in-sri-lanka-says-un-committee-post-review-2976326.html>.

[41] BBC News, *The hardline Buddhists targeting Sri Lanka's Muslims* (25th March 2013) BBC News < https://www.bbc.com/news/world-asia-21840600>.

[42] BBC News, *Sri Lanka Muslims killed in Aluthgama clashes with Buddhists* (16th June 2014) BBC News < https://www.bbc.com/news/world-asia-27864716>.

[43] Al Jazeera, *Sri Lanka: Police inaction as Muslim shops torched by Buddhists* (6th March 2018) Al Jazeera News Asia < https://www.aljazeera.com/news/2018/03/sri-lanka-muslim-shops-mosques-targeted-buddhist-hardliners-180305165900594.html>.

[44] Meenakshi Ganguli, *State of Emergency Declared in Sri Lanka – Violence by anti Muslim mobs highlights interethnic strife* (7th March 2018) Human Rights Watch < https://www.hrw.org/news/2018/03/07/state-emergency-declared-sri-lanka>.

[45] BBC News, above n 33.

crimes in Sri Lanka.[46] In 2012 the United Nations Human Rights Council adopted a resolution urging the Sri Lankan government to investigate the deaths of civilians during the final phase of the civil war.[47] In 2014, the UN Human Rights Council adopted Resolution 25/1, requesting the High Commissioner of the UN Human Rights to "undertake a comprehensive investigation into alleged serious violations and abuses of human rights."[48] In 2015 the United Nations issued the Report of the Office of the High Commissioner for Human Rights (OHCHR) Investigation on Sri Lanka urging the government to implement an international criminal tribunal, truth-seeking, reparations programs and institutional reforms.[49]

Many of these resolutions required the implementation of a classical transitional justice mechanism, with particular focus on an international criminal tribunal.[50] However, the Sri Lankan government did not support this proposal.[51] For instance, President Rajapakse in 2013 at the Commonwealth Summit declared that Sri Lanka has its own judicial mechanism to investigate the crimes.[52] Yet, the Sri Lankan legal framework has no provisions for war crimes or crimes against humanity.[53] Very few alleged perpetrators were charged under the domestic legal framework, and those charges had no relationship to war crimes. For instance, in August 2018, the magistrate court in Colombo ordered the arrest of Admiral Ravindra Wijegunaratne, chief defence staff, for the alleged role played in the abduction and murder of 11 Tamil children from rich Tamil families.[54] These children were kidnapped between 2008 and 2009, allegedly by Sri Lanka Navy, whose bodies were never

[46] Colum Lynchm *US urges Sri Lanka to probe alleged war crimes by government, rebels* (23rd October 2009) Washington Post<http://www.washingtonpost.com/wp-dyn/content/article/2009/10/22/AR2009102204674.html?noredirect=on>.

[47] Nick Cumming-Bruce, *In Resolution, UN Council Presses Sri Lanka on Civilian Deaths* (22nd March 2012) New York Times <https://www.nytimes.com/2012/03/23/world/asia/rights-body-passes-measure-on-sri-lanka.html>.

[48] A/HRC/30/CRP.2 Report of the OHCHR Investigation on Sri Lanka, Human Rights Council 30th session, Agenda item 2.

[49] Ibid.

[50] The Guardian, *UN calls for Sri Lanka war crimes court to investigate atrocities* (16th September 2015) The Guardian < https://www.theguardian.com/world/2015/sep/16/un-seeks-special-court-to-investigate-sri-lanka-war-atrocities>.

[51] Ana Pararajasingham, *Why is Sri Lanka Defying the United Nations* (22nd December 2017) The Diplomat < https://thediplomat.com/2017/12/why-is-sri-lanka-defying-the-united-nations/>.

[52] Christian Otton, *Sri Lanka has nothing to hide, says President Mahinda Rajapakse* (14th November 2013) The Sydney Morning Herald < https://www.smh.com.au/world/sri-lanka-has-nothing-to-hide-says-president-mahinda-rajapakse-20131114-2xk0i.html>.

[53] https://www.ft.com/content/2c1c1d84-5c50-11e5-97e9-7f0bf5e7177b (no details).

[54] Economy Next, *Court orders arrest of Sri Lanka's top military commander,* (29th August 2018) Economy Next, < https://economynext.com/Court_orders_arrest_of_Sri_Lanka's_top_military_commander-3-11703.html>.

found.[55] Previously in 2017, Commodore D.K.P. Dassanayake, former Navy spokesman, was arrested and bailed for the same offence.[56]

In September 2015, President Rajapakse requested the current government to reject the Report of the OHCHR[57] investigation on Sri Lanka.[58] In 2017, President Sirisena declared that he is opposed to any international involvement in the transitional justice mechanism.[59] Very recently, in late September 2018, President Sirisena in his address to the UN General Assembly declared that, "We do not want any foreign power to exert influence on us… I urge the international community to allow Sri Lankan people to solve their problems on their own."[60] This situation represents a deadlock between the international community and the Sri Lankan government.

This thesis examines two interrelated research questions: (a) whether the classical transitional justice mechanism proposed by the international community can help build reconciliation in Sri Lanka? and (b) what alternative mechanism can be implemented in support of the classical mechanisms to reconcile the divided communities in Sri Lanka? By answering these two questions, this thesis aims to suggest a successful reconciliation mechanism for Sri Lanka, to supplement the classical transitional justice mechanism demanded by the international community. In that way, this thesis aims to demonstrate how a successful reconciliation mechanism can be implemented in a Third World country. The thesis specifically will:

1. examine the central problems that restricts reconciliation in a Third World state;
2. examine the extent to which the current approach of international law facilitates a successful reconciliation process in post-conflict Third World states;

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[55] AFP, *Arrest of Sri Lanka's top military officer ordered* (30th August 2018) Dawn News, < https://www.dawn.com/news/1429856>.

[56] Colombo Gazette, *Former Navy spokesman D.K.P. Dassanayake granted bail* (9ty January 2018) Colombo Gazette < http://colombogazette.com/2018/01/09/former-navy-spokesman-d-k-p-dassanayake-granted-bail/>.

[57] A/HRC/30/CRP.2 Report of the OHCHR Investigation on Sri Lanka, Human Rights Council 30th session, Agenda item 2.

[58]Shihar Aneez and Ranga Srilal, *Rajapakse criticizes UN findings on Sri Lanka war crimes,* (23rd September 2015) Reuters < https://www.reuters.com/article/us-sri-lanka-rights/rajapaksa-criticizes-u-n-findings-on-sri-lanka-war-crimes-idUSKCN0RM23J20150922>.

[59] Shihar Aneez, *Sri Lanka divided as panel backs foreign judges to probe war crimes* (6th January 2017) Reuters < https://www.reuters.com/article/us-sri-lanka-rights-un/sri-lanka-divided-as-panel-backs-foreign-judges-to-probe-war-crimes-idUSKBN14P2CP>.

[60] Daily Mirror, *no need of foreign interference: allow us to solve our problems-MS* (26th September 2018) Daily Mirror. Shihar Aneez, *Sri Lanka divided as panel backs foreign judges to probe war crimes* (6th January 2017) Reuters < https://www.reuters.com/article/us-sri-lanka-rights-un/sri-lanka-divided-as-panel-backs-foreign-judges-to-probe-war-crimes-idUSKBN14P2CP>.

3. highlight and discuss the elements (as solutions) that will address the identified central problem of reconciliation in post-conflict Sri Lanka; and
4. apply the identified research contributions to the Sri Lankan case study to recommend the best method of successful post-conflict reconciliation mechanism in Sri Lanka.

Now this chapter turns to introduce the notion of transitional justice as it has been recognised by the international community.

1.3 The notion of transitional justice

Transitional justice mechanisms attempt to provide justice to the victims of systematic violations of human rights and other abuses of past conflicts. [61] The systematic abuses of past conflicts in certain Latin American and Eastern European states during 1980s and 1990s, including Argentina, Chile, Guatemala, Bosnia and Herzegovina and South Africa led to the beginning of this concept.[62] At the time, these states were undergoing various levels of political transition, but victims of abuses demanded justice.[63] To allow political transition and to serve justice, the concept of transitional justice was introduced.

There are two major goals of transitional justice: (a) providing justice to victims and (b) reinforcing possibilities for peace, democracy and reconciliation.[64] The first aim, providing justice to victims is a retributive form of justice. [65] Retributive justice intends to punish the perpetrators through a criminal justice system.[66] Contrastingly, the second aim comes under the restorative form of justice[67] which focuses on healing the relationships.[68] To achieve either of these aims, the first step is political transition. When political transition has taken place, it becomes possible to work towards providing for the twin goals of transitional justice: justice to victims and reinforcing peace, democracy and reconciliation.

[61] The-United-Nations, 'What is Transitional Justice? A Backgrounder' (United Nations Documents, 2008)
[62] Lara Waldorf, 'Anticipating the past: Transitional justice and socio-economic wrongs' (2012) 21 (2), *Journal of Socio and Legal Studies*, 177.
[63] Ibid.
[64] David Bloomfield, Teresa Barnes and Luc Huyse, 'Reconciliation after Violent Conflict: A Handbook' (Handbook Series, International Institute for Democracy and Electoral Assistance 2003); Harsh Mander, *Fear and Forgiveness – The Aftermath of Massacre* (Penguin Books, 1st edition 2009).
[65] Nina Gulzari, *Implementing Transitional Justice: A Study of South Africa and Bosnia and Herzegovina on the Relevance of Context*, (Master's thesis, November 2017).
[66] Koodoruth Ibrahim, the Blending of Retributive and the Restorative Justice Approaches to Combat Domestic Violence: The Case of Mauritius, (2013) 3 (18), *International Journal of Humanities and Social Science* 69.
[67] Ibid 70.
[68] Ibid.

In a Sri Lankan context, the 2015 presidential election made some political transition in the country.[69] The decade long Rajapakse regime, which ended the civil war and who is largely accused of war crimes, lost power in this election. Now, Sri Lanka needs to concentrate on the second stage for reconciliation.

The objective of this thesis, relates to the transitional justice goal of healing relationships. More specifically, the thesis aims to identify the possibilities for effective reconciliation in Sri Lanka. However, it is essential to note that any individual's commission of war crimes like murder and crimes against humanity cannot be dealt with by amnesties and pardons.[70] Perpetrators of war crimes must be dealt with through a retributive justice mechanism. For this reason, this thesis does not propose a mechanism to replace the classical mechanisms for reconciliation. Rather, this thesis proposes to establish an additional mechanism to support the retributive justice mechanism (classical). The additional mechanism should address the immediate needs[71] of the victims of the war.

In order to continue the analysis, a precise definition of the term reconciliation is needed. Transitional justice scholars have defined reconciliation as both a process and a result.[72] For instance, John Paul Lederach emphasises that reconciliation is a 'process of change and redefinition of relationships.'[73] For some other scholars, reconciliation is a process that is focused on the end-state of reconciling the divided communities.[74]

In terms of the process, reconciliation can be classified as 'thin reconciliation' (functional) or 'thick reconciliation' (regenerative).[75] Thin reconciliation takes place to achieve 'simple coexistence.'[76] Under thin reconciliation, there will be no violence between

[69] Kate Cronin-Furman, *Sri Lanka's surprise political transition,* (12th January 2015) The Washington Post <https://www.washingtonpost.com/news/monkey-cage/wp/2015/01/11/sri-lankas-surprise-political-transition/?utm_term=.39b0846deb36>.

[70] Zimbabwe Human rights NGO Forum v Communication No. 245/2002, Decision, 15 May 2006, African Human Rights Law Report, African Commission on Human and Peoples' Rights [AHCPR], 78, 200.

[71] For the purpose of this thesis, immediate needs are referred to the human needs that are required at the immediate aftermath of a war. This includes access to food, shelter and proper infrastructure like access to sanitary needs. Chapter 5 of this thesis analyses this claim further.

[72] David Bloomfield, 'On Good Terms: Clarifying Reconciliation' (Berghof Report No. 14, October 2006, Berghoff Research Center for Constructive Conflict Management) 6.

[73] John Paul Lederach, 'Civil Society and Reconciliation' in *Turbulent Peace: The Challenges of Managing International Conflict* (Washington DC, USIP) 847.

[74] Lara Waldorf above n 62, 117.

[75] Paul Seils, 'The Place of Reconciliation in Transitional Justice – Conceptions and misconceptions' (2017) *International Center for Transitional Justice Briefing paper* 1.

[76] Elin Skaar, 'Reconciliation in a Transitional Justice Perspective', (2013) 1 (1), *Transitional Justice Review* 4, 65.

the parties.[77] Parties to the conflict put down their weapons and obey the existing law that upholds peace and democracy.[78] However, in this type of a situation people do not trust each other.[79] This is at the very initial stage of reconciliation since it primarily focuses on ending the violent incidents.

Thick reconciliation, on the other hand, is complex and involves improving respect for the dignity of all persons, reversing structural causes for discrimination and reducing marginalisation.[80] This type of reconciliation attempts to heal the damaged relationships in the individual level. Due to its nature, thick reconciliation is also known as regenerative reconciliation. Rather than focusing on the violent incidents, thick reconciliation focuses on the root causes for the conflict.[81] As stated above, violent conflict in Sri Lanka has ended. However, Tamils and Sinhalese live with fear and lack of trust because the root causes of the conflict have not been addressed. Thus, for the purpose of this research, thick reconciliation over thin reconciliation is preferred.

The large scholarship on transitional justice[82] demonstrates that several means have been utilised to achieve its aims. The classical transitional justice mechanism includes at least six means: criminal prosecutions, truth commissions, reparations programs, gender justice, security system reforms and memorialization efforts.[83] Amongst these mechanisms, the UNHCR resolution on Sri Lanka required the implementation of a truth commission and a hybrid court. Hence, the third chapter to this thesis will make a comprehensive analysis of these two mechanisms.

Considering these factors, for the purpose of this research, reconciliation is defined as, a process which is used to heal the damaged relationships caused by massive human rights violations.[84] The term reconciliation can be used in different contexts. Reconciliation

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[77] Ibid.
[78] David Crooker "Reckoning with Past Wrongs: A Normative Framework" in *Dilemmas of Reconciliation: Cases and Concepts*, eds. Catol A.L Prager and Trudy Govier (Waterloo, Ont.: Wilfred Laurier University Press, 2003) 54.
[79] Lara Waldorf, above n 62.
[80] Paul Seils, Above n 75, 1.
[81] Ibid.
[82] See for example, Ruti G. Teitel, *Transitional Justice,* (Oxford University Press, 1st edition, 2004); Susanne Buckleyistel et al, *Transitional Justice Theories*, (Routledge Taylor and Francis Group, 1st edition, 2014); Colleen Murphy, *The Conceptual Foundations of Transitional Justice,* (Cambridge University Press, 1st edition 2017).
[83] Lara Waldorf, 'Transitional Justice and DDR: The Case of Rwanda' International Centre for Transitional Justice, (New York, June 2009).
[84] Ibid.

originally derived from the Latin term *reconciliare,* which means 'make friendly again.'[85] Christianity uses this term to define the damaged relationships between the God and people.[86] The South African Truth and Reconciliation Commission equated the term reconciliation with forgiveness.[87] These definitions are relevant to a post-conflict reconciliation setting. Put simply, war damages relationships between the parties to the conflict. In the aftermath of the conflict, it is essential to repair the relationships between these parties. Instead of God and people relationship, post-conflict reconciliation focuses on healing the damaged relationship between parties to the conflict.

Now this chapter turns to examine the conceptual framework utilized in the forthcoming chapters of this thesis.

1.4 Conceptual framework

The second chapter of this thesis will demonstrate that the existing mechanisms for transitional justice, and reconciliation in particular, have serious shortcomings.[88] For this reason, reconciliation should be viewed from a different perspective. This thesis takes the Third World Approaches to International Law (TWAIL) as an alternative approach to examine the problem of reconciliation in Third World states. TWAIL was initiated by Third World academics for the purpose of introducing a more just international legal system against the existing international law.[89] TWAIL requires a reconsideration of classical international law from the grassroots perspective of Third World people. Until now, TWAIL has not been utilised as a framework for analysis of post-conflict reconciliation. Accordingly, this thesis takes a novel step in using TWAIL as an approach to post-conflict reconciliation in Sri Lanka. This thesis demonstrates that from a TWAIL perspective, the central obstacle to reconciliation in a Third World country is the increased structural violence that resulted from the period of conflict.

[85] R R. K. Barnhart, The Barnhart Dictionary of Etymology (1988), article "reconciliare."
[86] The Bible, 2. Cor. 5:19.
[87] Brandon Hamber and Hugo van der Merwe, "What Is This Thing Called Reconciliation?" (paper presented at the Goedgedacht Forum Cape Town, 1998). <http://www.wits.ac.za/csvr/articles/artrcb&h.htm>.
[88] Chapter 2 page 18 of this thesis.
[89] Makau Mutua and Antonie Anghie, 'What is TWAIL' (2000) 94 *American Society of International Law; Cambdridge University Press* 31.

Structural violence is violence which exists within the institutional or social structure in a given society. [90] In simple terms, there are several factors that cause structural violence to specific groups or individuals in a given society. For instance, a government policy can provide unreasonable benefits, or privileges to one ethnic group whilst providing disadvantages to another ethnic group. This creates conditions in which the unprivileged group has antipathy towards the privileged group. This thesis advances the idea that increased structural violence caused by the increased socio-political problems created by the civil war is the central obstacle to reconciliation. The second chapter to this thesis makes a comprehensive analysis of this claim.

To address this problem of increased structural violence, the thesis suggests the use of the capabilities approach (see chapter 2).[91] The capabilities approach identifies that all people must have the freedom to achieve wellbeing and this freedom should be based on the capabilities of the people. This approach is based on two main factors: functioning of the individuals (what individuals value doing or value being) and the freedom (the opportunity to accomplish what individuals' value) they have, to pursue the functioning.[92] This thesis argues that applying the capabilities approach is an effective way to mitigate increased structural violence and allow reconciliation.

The capabilities approach is a social justice (wellbeing) theory.[93] Hence, the solution suggested by this approach also focuses on advancing the social justice and wellbeing of individuals.[94] From a capabilities approach, this thesis suggests two main elements to pursue the reconciliation mechanism: (a) a strong power sharing mechanism to increase the political participation of the minority groups, and (b) economic reconstruction to ensure minority inclusion in the economic process. This thesis argues that these elements are required to achieve a restorative form of transitional justice. In chapter 3, the thesis

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[90] Johan Galtung, 'Violence, Peace and Peace Research' (1969) 6 (3), *Journal of Peace Research* 167.

[91] See, Amartya Sen, *Commodities and Capabilities,* (Oxford University Press, 1st edition, 1985). Amartya Sen, 'Development as Capability Expansion' (1989) 19, *Journal of Development Planning* 41-58*;* Amartya Sen, 'Capabilities, Lists and Public Reason: Continuing the Conversation' (2004) 10 (3) *Feminist Economics;* Martha Nussbaum, 'Nature, Functioning and Capability: Aristotle on Political Distribution' (1988) *Oxford Studies in Ancient Philosophy;* Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press 1st edition. 2000).

[92] Sabina Alkire, 'The Capability Approach and Human Development' (Presentation, Oxford Poverty and Human Development Initiative. <http://www.ophi.org.uk/wp-content/uploads/IDB-What-is-the-Capability-Approach.pdf>.

[93] Amartya Sen, above n, 91.

[94] Ibid.

demonstrates that the classical mechanisms for reconciliation including truth commissions and hybrid courts tends not to help in this mission in achieving restorative form of transitional justice.

Chapter 4 examines the first (proposed) element for reconciliation, a power sharing mechanism. This chapter introduces the elements for a successful power sharing mechanism and identifies the existing conditions for power sharing in Sri Lanka. It then examines the weaknesses of the Sri Lankan power sharing mechanism and proposes three recommendations to address these weaknesses: (a) election of a Governor from each Provincial Council; (b) implementation of national government consultative committees and (c) implementation of a permanent minority seat in the government.

Chapter 5 examines the economic elements of an effective reconciliation mechanism. The chapter starts with an analysis of the economic conditions in Sri Lanka and identifies the economic inequality in post conflict Sri Lanka. Then this chapter examines the reasons for the economic inequality and identifies lack of capabilities of the war victims and lack of credit facilities as a restriction. The fifth chapter then introduces three recommendations to address these problems.

1.5 Methodology

To examine the above research objectives this thesis critically investigates and analyses the existing sources of international law that analyse the concept of reconciliation. For instance, it examines the guidance notes of the United Nations Secretary General on transitional justice, and relevant UN resolutions, mandates and materials that establish the existing norms of international law towards reconciliation. Secondly, relevant literature belonging to reconciliation, TWAIL and the capabilities approach is examined. TWAIL is used to examine an alternative mechanism to supplement the existing approach. TWAIL attempts to avoid the First World and Third World political leaders' perspective by inviting to examine issues from a people's perspective. This research uses this perspective as an analytical theme. The capabilities approach is used to introduce the elements that should be implemented to address the central problem introduced in this thesis.

This thesis relies on primary sources such as statutes, treaties and guidance notes of the United Nations Secretary General. The thesis also places a substantial weight on (a) scholarly work on TWAIL and the capabilities approach and (b) literature and reports on Sri

Lanka's ongoing political and economic situation. There were some difficulties in accessing documents because the Sri Lankan government restricts access to information. Furthermore, given that TWAIL and the capabilities approach are relatively new subjects, there is less scholarly work available on these topics.

1.6 Contribution of this study

By using the above methodology, this thesis makes two main contributions. First it makes a contribution to the discipline of TWAIL. TWAIL is an emerging concept within public international law. It is still at a developmental stage and had been subject to criticism by academics of classical international law; and commendation by radical thinking Third World academics in international law.[95] The Third World has seen this approach as addressing the needs of the Third World population.[96] Given that Sri Lanka is a Third World state, this research is central to the needs of the Third World. Hence it attempts to analyse reconciliation from a Third World perspective and makes some contribution to the TWAIL scholarship.

Secondly, this thesis aims to make a contribution to the Sri Lankan reconciliation mechanism. Sri Lanka currently faces the need of establishing a reconciliation mechanism. The proposed reconciliation mechanisms are not capable of fully reconciling the divided parties as evident from the ranging acts of violence. Hence a successful reconciliation mechanism is required to supplement the existing approaches. The structure that is proposed by the United Nations had been subjected to criticism by the local population. It had also been rejected by several parties of the government. This research aims to contribute to the Sri Lankan reconciliation process by proposing a reconciliation mechanism that would supplement the existing mechanisms by addressing the existing socio-cultural framework in Sri Lanka.

Conclusion

Currently Sri Lanka experiences serious ethnic conflict due to the lack of a successful reconciliation mechanism. There is also a danger of the recurrence of a civil war in the

[95] Makau Mutua and Antonie Anghie, above n 89, 31.
[96] Ibid.

foreseeable future. The international community has suggested several mechanisms to support reconciliation in Sri Lanka. These 'classical' mechanisms require the implementation a criminal tribunal and a truth commission. Previous criminal tribunals and truth commissions established in relation to conflicts in other parts of the world have proven to be of limited success in reconciling divided ethnic groups. Hence, these mechanisms are important but not sufficient and should be supported by an alternative mechanism. The following chapters will examine an alternative mechanism to support these classical mechanisms in its mission of reconciling the divided ethnic groups in Sri Lanka.

Chapter 2 – Reconciliation: A new conceptual framework

Introduction

This thesis aims to lay the basis for introduction of a successful reconciliation mechanism for Sri Lanka. To this end, this chapter will identify the key preconditions for a successful reconciliation mechanism in a Third World country. For this purpose, the chapter is organized in three sections. The first section demonstrates the need to support the existing international law for reconciliation through an additional mechanism. It then introduces the TWAIL approach as an appropriate substitute to the existing international law framework for reconciliation.

The second section examines the reconciliation problem from a TWAIL perspective. From a TWAIL perspective, structural inequality leading to increased structural violence is a significant obstacle for a successful reconciliation mechanism in a post-conflict Third World country. It shows that structural violence emerges mainly due to the existing social and institutional structures in a given post-conflict society and causes unequal life chances triggering social division. As a result, one group in the society has antipathy against the other group(s), making it more challenging to address reconciliation.

The third section introduces a framework to address the increased structural violence and demonstrates that the initial requirement is to address the basic human needs of the victims. The capabilities approach suggests two main ways to address the basic human needs. This includes: political participation and economic development of the victims. In addition to this, an added requirement is suggested to achieve reconciliation within a reasonable timeframe.

This chapter concludes by demonstrating that implementation of these elements (in addition to the establishment of a criminal tribunal and other classical ways of reconciliation) can help reconciling the divided communities in a Third World post-conflict society.

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Section I – An alternative approach to international law

2.1 (a) Why an alternative approach is required?

With decolonization, a large number of newly independent states from Asia, Africa and Latin America entered into the international system in the 1950s and 1960s.[97] Upon their independence, these states experienced economic difficulties and struggled to recover from colonialism. For instance, World Bank reports (2013) indicate that the poverty rate in Sub-Saharan Africa is at 41.0%, South Asia at 15.1% whilst Europe and Central Asia remains at 2.2%.[98] Both Sub-Saharan Africa and South Asia were subjected to colonialism. This demonstrates that states which were under colonialism suffer from extreme poverty. Also, amongst the 23 countries with the lowest GDP, 19 states were under the colonial rule for a prolonged period.[99] In addition to these economic difficulties, the newly independent states experience some other problems that were caused during colonialism. For instance, in Africa the colonial masters divided territories by using unnatural borders which ignored local ethnic structure.[100] This resulted in ethnic and religious conflicts. Conflicts between (a) Maasai ethnic group in Kenya and Tanzania and (b) Hausa ethnic group in Nigeria and Niger are examples.[101] These records demonstrate that after independence, the colonized states encountered a series of problems.

To date, most of these problems have not been resolved. For this reason, even after their independence, the newly independent states seek economic and political assistance from their colonial masters. For instance, Indonesia's economy is heavily dependent on bilateral loans.[102] The top six countries that offer loans to Indonesia are the First World states including Japan, Germany, the United States, Austria, France and the Netherlands.[103] This means that Indonesia (in this case and Third World states in general) has an increased dependency on First World states. Bhupinder Chimni, a leading Professor of Law in the

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[97] Office of the Historian, *Decolonisation of Asia and Africa, 1945-1960* (01st April 2017) Office of the Historian <https://history.state.gov/milestones/1945-1952/asia-and-africa>.

[98] Tariq Khokhar, *How does extreme poverty vary by region?* (17th October 2016) The World Bank, <https://blogs.worldbank.org/opendata/chart-how-does-extreme-poverty-vary-region>.

[99] Graziella Bertocchi and Fabio Canova, 'Did Colonization Matter for Growth: Empirical Exploration into the Historical Causes of Africa's Underdevelopment?' (Draft, CPR London and CEPR Italy, December 1996).

[100] Stelios Michalopoulos and Elias Papaioannou, 'The Long-run Effects of the Scramble for Africa' (Working Paper No. 17620, National Bureau of Economic Research, November 2011).

[101] Ibid.

[102] National NGO Forum on Indonesian Development, 'Profiles of Indonesia's Foreign Debts' (Working Paper, International NGO Forum on Indonesian Development, August 2007) 4.

[103] Ibid.

TWAIL movement, defines this dependence as a 'relocation of sovereign economic power.'[104] For Chimni, the Third World states who are dependent on their First World counterparts have to limit their independent development.

As a result of this increased dependency, the Third World states are suppressed by the First World states. The approval of loans by the First World countries to the Third World countries are dependent on the willingness of the Third World states to pursue their agenda. For instance, Sri Lanka lost the European Union Generalized Scheme of Preferences (GSP) Plus in 2009 for the reason of not addressing the human rights related issues raised by the European Union.[105] However, in 2015, the European Union reinstated the GSP Plus concession on condition that the relevant issues will be addressed. For this reason, the current international politics pose 'unprecedented influence in shaping global policies and law.'[106]

This dependency restricts the participation of Third World states in the international system as independent and sovereign states.[107] This dependence, suppression and limitation is deepened due to the understanding of the Third World that the existing international law reflects First World interests. The Third World claim that in the creation of international law, the newly independent states had limited participation.[108] For instance, a number of international treaties including the Geneva Conventions and Kellog Briand Pact were enacted with a minimal Third World participation. One possible justification for the minimal participation of Third World states (from the First World countries) is the lack of human expertise from the Third World states. Practically, the newly independent states have not had proper human resources, since the colonial powers handled administration and finance services on behalf of them. For instance, in Nigeria when the colonial leaders left, there were only 150 lawyers and 160 doctors of local origin.[109] For this reason, Third

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[104] Bhupinder Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 (3), *International Community Law Review* 7; Mohsen Al Attar and Rosalie Miller, 'Towards an Emancipatory International Law: the Bolivarian reconstruction' (2010) 31 (3), *Third World Quarterly*.

[105] Xinhuanet, 'EU Council of Ministers approve GSP plus for Sri Lanka' (11th May 2017) <http://www.xinhuanet.com/english/2017-05/11/c_136275125.htm>.

[106] Bhupinder Chimni, Above n 101.

[107] Frederick Snyder and Surakiart Sathirathai, *Third World Attitudes toward International Law*, (Martinus Nijhoff Publishers, 1st edition, 1987) 3; Bhupinder Chimni, 'Prolegomena to a Class Approach to International Law' (2010) 21 (1) *The European Journal of International Law*.

[108] Ibid.

[109] Hussein Beihami and Fahram Meifa, 'The Effects of Decolonization in Africa' (2014) 34-39 *World Scientific News*, 35.

World people have not had the opportunity to participate in international law. As a result, the initial international law has a minimal Third World viewpoint.

The problems experienced by the Third World and the First World are different.[110] Hence, the international law with only a First World perspective does not equally answer the problems of the Third World and the First World. For instance, from climate problems to socio-cultural problems and from economic problems to political problems, the First World and the Third World differs. The South experiences a large number of ethnic and social problems. Comparatively, the West encounters a large number of political problems rather than ethnic and social problems.

Not only the problems but also the approach taken by the two groups to solve these problems differs. For instance, instead of accepting a judicial mechanism that is international in nature, Third World people tend to accept a non-judicial domestic mechanism.[111] The Gacaca court in Rwanda is a good example. In 2001, the Gacaca court was implemented in Rwanda to respond to the Rwandan genocide. This is a system of governance that implemented as per the law enforcement procedures followed in the Rwandan traditional cultural law rules.[112] The trusted citizens at the communal level, for instance the reputed elderly people, were the law enforcement officers and judges in this system. This system has been more widely accepted in the Rwandan communities than international courts. The reason for this acceptance is the familiarity and trust these individuals have towards these institutions.[113]

Also, the Third World and the First World differently respond to the notion of law. For most of the Third World communities, law is a "body of ethical and political principles."[114] However the First World identifies the law as a "logical system of rules to be

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[110] See, Maurice Flory, 'Adapting International Law to the Development of the Third World' (1982) 26 (1), *Journal of African Law* 12; Jack Goldsmith and Eric Posner, *The Limits of International Law* (American Enterprise Institute for Public Policy Research, 1st edition, 2005).

[111] Ibrahim Shihata, 'The Attitude of New States Toward the International Court of Justice' (1965) 19(2), *International Organization*; RP Anand, 'Role of the New Asian-African Countries in the Present International Legal Order' (1962) 56(2), *The American Journal of International Law*.

[112] The United Nations, *The Justice and Reconciliation Process in Rwanda: Background Note* (March 2014), The United Nations <http://www.un.org/en/preventgenocide/rwanda/pdf/Backgrounder%20Justice%202014.pdf>.

[113] Ibid.

[114] Quincy Wright, 'The Influence of the New Nations of Asia and Africa upon International Law', (1958) *Foreign Affairs Reports* 38.

applied for the solution of disputes and the conduct of relations."[115] As a result, the response of the Third World and the First World to international law also differs. For instance, Rwandan people positively respond to the Gacaca court system. As described above, this system allows the respected adults in the community to hear the grievances of the people and provide solutions accordingly. In that sense, this system is not a judiciary itself, but a more culturally personable approach to address grievances.

Given the circumstances, it is clear that there is a need for an alternative approach to include the Third World interests in the existing international law.

2.1 (b) TWAIL – an appropriate alternative

In response to the above concerns, a separate movement was established, which came to be known as Third World Approaches to International Law (TWAIL). The intention of this movement was to pursue the interests of the Third World people.[116] The inner ideology of TWAIL differs from one TWAILer to another and they do not share similar interests on political, economic and social problems faced by the Third World people.[117] However, it is their common understanding that existing international law is oppressive and unjust.[118] Thus, TWAIL commonly responds to 'illegitimate, predatory, oppressive and unjust regime of international law.'[119] Hence, the common quest of TWAIL is to pluralize existing international law to include the interests of the Third World people.[120] In this mission, TWAIL does not reject classical international law. Rather, it attempts to reform the existing international law to include the interests of the Third World people.

To achieve this aim, TWAIL identifies the problems faced by the Third World people and provide solutions in a manner that would match with the Third World conditions. Accordingly, the solutions suggested by TWAIL intends to empower the Third World people. Firstly, TWAIL recognices multiple identities and heterogeneity,[121] and that can provide

[115] Ibid.

[116] Bhupinder Chimni, Above n 104, 26; Mohsen Al Attar and Rosalie Miller, 'Towards an Emancipatory International Law: the Bolivarian reconstruction' (2010) 31 (3), *Third World Quarterly*.

[117] Makau Mutua and Antonie Anghie, Above n 89, 31; John D Haskell, 'TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law' (2014) 27 (2*) Canadian Journal of Law & Jurisprudence*.

[118] Ibid 4.

[119] Ibid.

[120] David Fidler, 'Revolt against or form within the West? TWAIL, the developing World, and the Future Direction of International Law' (2003) *Chinese Journal of International Law*, 38.

[121] James Thuo Gathii, 'Rejoinder: Twailing International Law' (1999) 98, *Michigan Law Review* 2071; Andrew Sunter, 'TWAIL as Naturalized Epistemological Inquiry' (2007) 20 (2) anadian Journal of Law and Jurisprudence.

solutions to some of the Third World problems in a national and an international context.[122] In an international context, heterogeneity claims the inclusion of Third World perspective in the international law. In a national context, heterogeneity claims that different ethnicities must be recognized. This directly addresses the problem of non-recognition of Tamils in Sri Lanka by Sinhalese. Thus, TWAIL whilst fighting for equal standing in the international order, claims equal standing in a national context.

Secondly, whilst opposing the autocratic and unjust First World policies, TWAIL also opposes the tyranny and autocratic policies of Third World leaders.[123] Instead, TWAIL prefers solutions that are accepted by the Third World people. Accordingly, TWAIL takes a people-centric approach towards most of the problems experienced by the Third World people.[124] For this reason, TWAIL does not oppose the existing international law as a whole but proposes a more flexible approach that could make adequate solutions to most of the problems of the Third World people. As discussed elsewhere in this thesis, from a people's perspective, structural inequality is a significant problem for reconciliation. TWAIL provides significant attention to this structural inequality. For instance, the organizing characteristic of TWAIL is twofold: (a) to deconstruct structural inequality and (b) provide an alternative legal edifice for international governance.[125] In that sense, the theoretical notion of TWAIL leads to address the structural inequality that has been systematized into the very structure of a given society. Hence TWAIL should be identified as a people-centric approach that adjusts the existing conditions in international law as required for their needs.

Amongst the problems that TWAIL discussed so far, problems related to self-determination, non-intervention, foreign direct investment, special and differential treatment in international trade and law of the sea are in the forefront.[126] Given the increased number of conflicts that emerged in the Third World over the last few decades, post-conflict reconciliation has been a major problem for the Third World people. Despite the fact that TWAIL intends to provide solutions to the problems faced by the Third World

[122] Lahouari Addi. 'The Failure of Third World Nationalism. Journal of Democracy' (1997) 8 (4) *Johns Hopkins University Press*, 110-124.
[123] Bhupinder Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 (3) *International Community Law Review.*
[124] Larissa Ramina, "Third World Approaches to International Law and human rights: some considerations' (2018) 5 (1) *Journal of Constitutional Research 263.*
[125] Asad Kiyani, John Reynolds and Sujith Xavier, 'Third World Approaches to International Criminal Law' (2016) *Journal of International Criminal Justice* ,915-920.
[126] David Fidler, above n 117.

people, to date TWAIL scholars have not examined post-conflict reconciliation to identify adequate solutions. As a result, problems related to post-conflict reconciliation mechanisms were largely left unanswered. This makes the existing international legal framework the only source of application for reconciliation. There are (at least) three main reasons to propose a reconciliation mechanism that is within the TWAIL approach.

First, most of the reconciliation mechanisms within the exiting international legal framework have failed, mainly because these mechanisms disregard the Third World perspectives. Mechanisms in Rwanda, former Yugoslavia and Cambodia are examples of this. It appears that these mechanisms should tailor to the Third World needs. TWAIL approach also has a similar perspective; whilst not rejecting the claims made in the classical international law, TWAIL argues that the classical international law should be changed to provide more effective solutions to the problems of Third World people. Chapter 3 makes a comprehensive analysis on the lack of success of truth commissions and hybrid courts.

Second, the mechanisms established for reconciliation under the existing legal framework limitedly reflect the needs of the people. An alternative mechanism is needed to reflect the actual needs of the people. The application of the classical international law for reconciliation has involved a number of elements. Most of these elements are detailed in the Guidance Note of the Secretary General.[127] This Guidance Note states that in the implementation of a transitional justice mechanism, the UN instruments should be taken into consideration.[128] Even though the second principle of the guidance note requires the responsible officers to take account of the unique political context of the particular country, the commentary to this element provides that measures should be "framed first of all in the context of international legal obligations."[129] The international legal obligations to transitional justice are found in various treaties[130] (hard law)[131] and several UN

[127] UN Guidance Note UN Secretary General, 'Guidance Note of the Secretary-General - United Nations Approach to Transitional Justice' (UN Secretary General, 2010).
[128] Frances Stewart, *Horizontal Inequalities and Conflict- Understanding Group Violence in Multiethnic Societies* (Palgrave Macmillan, 2008) 3.
[129] UN Secretary Journal above n 124. There is no such thing a 'UN Secretary Journal' - you need to be precise and accurate.
[130] Genocide Convention, *Convention against Torture,* opened for signature, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987), *The Inter-American Convention on Forced Disappearance of Persons*, opened for signature 06 September 1994, 68 OAS Treaty Series, (entered into force 28 March 1996). *The Convention on Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity,* opened for signature, 26 November 1968, 754 UNTS 73, (entered into force11 November 1970).

documents[132] (soft law).[133] These principles also require the international community to have specific focus on the transitional justice process. In practice when the international community works closely with the transitional justice process, domestic factors will be disregarded. This has been the case in most of the transitional justice mechanisms, including Cambodia, Rwanda and former Yugoslavia. Solutions provided in Cambodia has not examined the domestic factors and Rwandan people never felt the consequence of the mechanism given the distance of the mechanism, not only physically but also from the hearts of the people.

Third, the existing mechanism on reconciliation does not give attention to the most substantial issue of increased structural violence. As a result, existing mechanisms left addressing a substantial restriction to reconciliation. Through a practical lens, at the end of the conflict, victims of the conflict encounter socio-cultural, economic, political and emotional challenges. The classical transitional justice framework attempted to answer the emotional challenges by way of a criminal tribunal or a truth-seeking mechanism. However, the political, economic and social problems have not been properly addressed by these mechanisms. As a result, it is challenging for these mechanisms to reconcile the divided communities.

TWAIL scholars including Bhupinder Chimni, Anthony Anghie, Sujith Xavior, and James Gathii argue that mainstream international law does not sufficiently address the problems of third world people.[134] In order to address these problems, TWAIL proposes a different approach to change the content of international law in order to provide solutions to the problems of the third world people. Mainstream international lawyers argue that

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[131] Hard laws refer to the binding legal instruments which gives binding responsibilities to a state. I corrected this in an earlier version. Please refer back to my suggestion. You should also provide a source of the definition.

[132] Updated Principles to Combat Impunity and UN Secretary General's report on the Rule of Law and justice in Conflict and Post-Conflict Societies. This is not a complete citation. Are you referring to two documents? Then you need two complete references with pinpoints – where can the reader find these documents and the part of those texts on which you rely?

[133] Soft laws refer to the quasi-legal instruments that has no binding effect or has a very little binding force. Where did you get this definition from? Plus grammatically incorrect. Please correct and provide source of definition.

[134] Bhupinder Chimni, above n 109, 26; Mohsen Al Attar and Rosalie Miller, 'Towards an Emancipatory International Law: the Bolivarian reconstruction' (2010) 31 (3), *Third World Quarterly* 209, 211, Makau Mutua and Antonie Anghie, above n 89, 31, John D Haskell, 'TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law' (2014) 27 (2*) Canadian Journal of Law & 383, 383,* James Thuo Gathii, 'Rejoinder: Twailing International Law' (1999) 98, *Michigan Law Review* 2071; Andrew Sunter, 'TWAIL as Naturalized Epistemological Inquiry' (2007) 20 (2) *Canadian Journal of Law and Jurisprudenc*e 202.

TWAIL does not have an external ground on which to challenge the hegemony of international law.[135] In other words, these scholars argue that TWAIL is not an alternative to mainstream international law. [136] Rather, TWAIL consists of the same principles used in mainstream international law.[137]

In responding to this claim, TWAIL scholars argue that TWAIL consist of mainstream international law however when applying these principles, TWAIL takes a flexible approach with the aim of answering third world problems.[138] Clarifying this position further, TWAIL scholars explain that the third world leaders are unwilling to follow mainstream international law.[139] For instance, when the Sri Lankan civil war came to an end in 2009, President Rajapakse showed his unwillingness to follow international principles on war crimes claiming that these principles would not support the Sri Lankan case.[140] Third world leaders' unwillingness to comply with international law leads third world people to believe that the existing international law oppresses them.[141]

However, TWAIL scholars take a different approach to suggest solutions for third world countries. For instance, the revised Anglo-Iraq Treaty of 1948, which followed mainstream international law, created a semi-colonial mandate system in Iraq.[142] There were several protests and requests to change the content of the treaty by Iraqis. These local reflections were not considered when drafting the treaty. TWAIL scholars like Ali Hammoudi recently analysed the treaty and proposed an alternative mechanism to the semi-colonial mandate system. [143] Hammoudi argues that a TWAIL perspective at the time could have

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[135] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality,* Cambridge University Press (2011) 153.
[136] Ntina Tzouvala, "TWAIL and the Unwilling to Unable - Doctrine, Continuities and Ruptures," (2016) 109 *American Journal of International Law*, 266.
[137] Ibid.
[138] Ibid, 267-269.
[139] Ntina Tzouvala, above n 136.
[140] Jyoti Thottam, *The Man who Tamed the Tamil Tigers* (13 July 2009) The Content Time <http://content.time.com/time/world/article/0,8599,1910095,00.html.>
[141] James Gathii, 'The Agenda of Third World Approaches to International Law (TWAIL)' in *International Legal Theory Foundations and Frontiers, (*Cambridge University Press, 2019) 41. (unpublished)
[142] Usha Natarajan et al. 'Introduction: TWAIL – on Praxis, and the Intellectual' (2016) 37 (11) *Third World Quarterly*, 1946, 1951.
[143] Ali Hammoudi, "The Conjunctural in International Law: the Revolutionary Struggle against Semi-Peripheral Sovereignty in Iraq" (2016) 37 (11) *Third World Quarterly*, 2028, 2040.

produced an effective alternative to the mandate system.[144] This argument and his alternative proposals are based on the interests of the local people.[145]

The starting point of TWAIL analysis is to examine the needs of third world people and then propose solutions. Therefore, it is clear that TWAIL provides an alternative perspective to existing international law. [146] In this context, this thesis proposes that the existing classical international mechanisms for reconciliation should be supplemented by an approach to that provides solutions to the problems of the third world people. This chapter now turns to examine structural violence and its relationship to reconciliation. Then it analyses how TWAIL offers a solution to this problem of structural violence.

Section II - Central focus of the new approach

2.2 Structural Violence

Whether violence can include forms other than physical violence is a contentious issue. Johan Galtung argued that violence can include both physical violence and non-physical violence[147] and categorized them into three forms: direct violence, cultural violence and structural violence.[148] Direct violence is the most obvious type of violence in which every form of violence from rape, murder, conflict, to even psychological abuse comes under. Cultural violence is a form of violence that arises from aspects of culture and social life and that causes violence happening in a particular society. The third form is structural violence. Galtung defines structural violence as a form of violence that linked to the structure of the society and its institutions. Hence, in structural violence, violence is an integral part of the very structure of human organisation rather than that of human conditions such as rape and murder.[149] Galtung argues that structural violence is caused by the "avoidable impairment of fundamental human needs". Paul E Farmer clarifies this by

[144] Ibid, 2040.
[145] Ibid, 2041.
[146] Martti Koskenniemi, 'The Politics of International Law, 20 Years Later' (2009) 20 (1) *European Journal of International Law,* 7, 9.
[147] Johan Galtung 'Cultural Violence' (1990) *Journal of Peace Research* 27(3), 303; Oliver Ramsbotham, Tom Woodhouse and Hugh Miall, *Contemporary Conflict Resolution* (Polity Press, 2011) 199-202.
[148] Ibid.
[149] Johan Galtung, above n 90, 167.

describing structural violence as "social arrangements that put individuals and populations in harm's way."[150]

Through these definitions, it is clear that structural violence arises owing to the particular social or institutional structures. Put simply, two main groups exist in a post-conflict society: victims of the conflict and non-victims of the conflict. This thesis acknowledges that according to the level of victimization these groups can be categorized further. For instance, some groups can be victimized by the civil war by disruption of human resources, whilst some other groups may only be affected by lose of infrastructure facilities.

Wars tend to cause structural inequality between the victims and non-victims of the conflict. On the one hand, the direct effect of the war i.e. destruction of the infrastructure, livelihood, human capital can cause a substantial economic and political loss to the victims of the conflict. Comparatively, non-victims (who are outside the conflict situation) are not affected as heavily as the victims.[151] Given that the non-victims get more access to education and better infrastructure facilities, they are more privileged than the victims. For this reason, as a direct result of the civil war there could be an increase in structural inequality within the society.

On the other hand, social conditions that lead to the conflict can further structural inequality between the two groups. Put simply, chapter 1 of this thesis identified several causes for the emergence of civil war in Sri Lanka.[152] Amongst them were the discrimination and political exclusion of the Tamils and lack of proper economic facilities. Conflict can trigger this process. For instance, currently Sri Lanka faces high levels of discrimination against the Tamils. It has risen to the level that certain Sinhalese Buddhist groups remove the green and orange stripes in the Sri Lankan flag which demonstrates the inclusion of Tamils and Muslims in the Sri Lankan society. Also, as chapter 1 demonstrated, a number of violent incidents against the Tamils were emerged in contemporary Sri Lankan society. Thus, it is clear that the existing social and institutional structure causes structural inequality within a post-conflict society.

Unlike direct violence, the cause of structural violence are the policies, rules or norms that are institutionalized in a particular social structure. In a post-conflict situation,

[150] Paul E Farmer, Bruce Nizeye, Sara Stulac and Salmaan Keshavjee, (2006) 'Structural Violence and Clinical Medicine' *Policy Forum*, 3 (100) 1686.
[151] Chapter 1 page 2 of this thesis.
[152] Chapter 1 page 2 of this thesis.

the governing structure continues to be affected by the policies or norms prevailing during the conflictual situation. This is triggered by the social settings of the war. Here, the notion of thick reconciliation interlinks with structural violence. As explained elsewhere in this thesis,[153] thick reconciliation requires the reversal of the structural causes for discrimination and marginalization.[154] Structural violence, which is a result of the increased inequality between two (or more) groups, emerges as a result of the policies or norms in a particular society. For this reason, in order to address thick reconciliation, structural violence should be mitigated.

Policies of a government or the social norms caused by a civil war can provide undue advantage to one ethnic group and disadvantage to another ethnic group. Violence can occur due to this unequal treatment. Take a simple example, in 1956 the Sri Lankan government brought an Act to make Sinhalese language the official language in Sri Lanka.[155] The Tamils considered having similar recognition to their language as a basic need, which was ignored for years.[156] As a result, the government work was done only in Sinhalese language, including in Tamil dominated areas. For this reason, Tamils who had less competency in Sinhalese language experienced severe conditions. Given that the government documents (applications, forms etc.) were only in Sinhalese language; the judiciary heard cases in Sinhalese language and interviews for government jobs were conducted in Sinhalese language. Tamils were deprived of government welfare and privileges. As chapter 1 explained, this Act is one of the main reasons for the emergence of discrimination and marginalization of the Tamil minorities which ultimately resulted in direct violence between the Sinhalese and the Tamils.[157]

Take another example. In Rwanda, after the genocide the racial identities for Hutus and Tutsis existed for a prolonged period. Racial inequality is one major form of structural violence.[158] Hence, in the process of addressing structural violence in a post-conflict society, racial inequality would be a central problem. The severity of racial inequality often gives rise

[153] Chapter 1 page 10 of this thesis.
[154] Paul Seils, *The Place of Reconciliation in Transitional Justice – Conceptions and misconceptions*, ICTJ briefing paper, June 2017, 1.
[155] Official Language Act (Sri Lanka) (No. 33 of 1956)
[156] Sehar Mushtaq, 'Identity Conflict in Sri Lanka: A Case of Tamil Tigers' (2012) *International Journal of Humanities and Social Sciences,* 202; Sasanka Perera, 'Reflections on Issues of Language in Sri Lanka' in *Proposal for Bilingual Competency Development Programme for Public Sector Employees (*1st ed. 2011) 56.
[157] Chapter 1 page 5 of this thesis
[158] Kathleen Ho, 'Structural violence as a Human Rights Violation' (2007) *Essex Human Rights Review* 4 (2) 4.

to poverty and other forms of structural violence.[159] This has been the case in most post-conflict societies. When racial inequality is tied to poverty, this affects the institutionalized social structure of that society. This can restrict the fundamental needs of an individual or a group of individuals being met.

Due to structural violence, the group who undergoes suffering generates a strong form of antipathy against the privileged. In that sense, this research identifies three main requirements for structural violence: (a) policies, norms or rules within a particular society; (b) structural inequality that privileges one group to the detriment of another group; (c) antipathy that the unprivileged group have towards the privileged.[160]

In terms of a post-conflict situation, increased structural violence can be a major problem in limiting attempts at reconciliation. The existing social and institutional structure in a post-conflict society tends to deepen the violence between the parties. For instance, post-conflict societies are mainly divided in terms of the racial identity. Also, due to the massive destruction caused by war, unequal life chances is a key problem in a post-conflict situation.[161] For instance, the people who are heavily affected will lose their relatives, houses, belongings and even the livelihood.[162] However, the people who have not been affected may not suffer the same consequences. This causes a structural imbalance in the society. Hence, it is highly probable that increased structural violence exists in a post-conflict society due to the large number of unmet needs of the war victims.

Thus, in the quest of reconciling the divided parties, it is essential that priority is given to address the issue of increased structural violence since that is one central problem that requires an immediate solution. Put simply, the direct effect of a violent conflict towards the economy of a given society is on economic growth.[163] The unsafe business environment can destroy the productive forces and can result in the increase of transaction costs.[164] Violence can also result in destroying the human capital causing more inequality to the victims. For this reason, violent conflicts often cause disparities in income level. Accordingly, one group, usually the non-victims get some advantages, the other (victims)

[159] Ibid.
[160] See the above analysis in chapter 2 of this thesis.
[161] Office of the United Nations High Commissioner for Human Rights, Rule of Law Tools for Post-Conflict States – Truth Commissions, 2006.
[162] Ibid.
[163] Cagatay Bircan, Tilman Bruck and Marc Vothknecht, Violent Conflict and Inequality IZA Discussion Paper No. 4990The Institute of the Study of Labor (IZA) 6.
[164] Ibid.

often are deprived of economic conditions.[165] For instance, reports indicate that the poverty rate in the Northern Province (where the war took place) is 7.7% whilst the metropolitan Western Province remaining at 1.7%.[166] Similarly, the unemployment rates in the two areas (war affected and non-war affected) are at 2.9% in Colombo and 6.3% in Kilinochchi.[167]

Given that there is no society that has purely eradicated structural violence, the reconciling authorities should focus on reducing the level of structural violence in the society to avoid the recurrence of a civil war. In the absence of this, reconciliation might not reach its full potential since the mechanism does not address a central problem. Also, when the structural inequalities coincide with political factors, it will make the situation worse.

When the reconciliation mechanisms avoid considering increased structural violence as a threat and attempt to address other factors such as justice and political reforms, it weakens the reconciliation process. Accordingly, it might give rise to another armed conflict. For instance, in Sri Lanka, during the first phase of the civil war, adequate measures were not taken to mitigate structural violence within the society.[168] This resulted in the emergence of a more harmful armed conflict within a few years.[169] Hence, it is important that emphasis is placed on mitigating the increased structural violence as an aim of a reconciliation mechanism.

Transitional justice literature has not given sufficient focus to the problem of structural violence. Rather, peace building and trust building were considered to be the main aims of reconciliation.[170] There are two major reasons for considering minimizing the level of structural violence as a major aim of any reconciliation mechanism. First, until the structural violence is addressed, it is difficult to reduce the level of inequality in the society. For that reason, reaching peace is challenging. Given that peace is important for reconciliation, it is essential that the reconciliation mechanism is focused on mitigating structural violence. Second, as long as the structural violence and the structural inequality is high, there is a threat of reemergence of the conflict. Hence, despite other measures taken

[165] Ibid, 4.
[166] Department of Census and Statistics, *Economic Statistics of Sri Lanka 2017,* (Department of Census and Statistics, September 2017) 14.
[167] Ibid, 13.
[168] See Kristine Hoglund and Isak Svensson, 'The Peace Process in Sri Lanka' (2002) *Civil Wars* 5(4): 103- 119; Anushman Rawat, 'Civil War in Sri Lanka', The Newsletter (Sri Lanka), 2012, 14.
[169] See chapter 1 page 2 of this thesis.
[170] For a comprehensive analysis on the aims of transitional justice refer the first chapter to this thesis.

for reconciliation, if the core problem, structural violence, is not addressed, there is a threat of conflict recurrence.

With reference to the first count; that mitigating structural violence is important for peace; the focus must be on two questions: (a) what is peace in a post-conflict society and (b) is it possible that the end of the armed violence results in developing peaceful relations between conflicting parties? Galtung defined peace as "the absence of violence."[171] The end of armed conflict would necessarily mark the end of casualties and deaths resulting from conflict. This does not mean that peace is achieved in the post-conflict society, since the parties to the conflict are suspicious of each other and seek vengeance. Hence, it is obvious that peace is not achieved in the post-conflict society.

Section III – Addressing structural violence

The next step is to determine how the aim of mitigating structural violence should be best achieved. Given that social inequalities are inherently linked to structural violence, there is a need for a model which addresses social inequality in a holistic way. The capabilities approach is such a model. The chapter now turns to examine whether the capabilities approach can provide criteria for a successful reconciliation process in a post-conflict society.

The capabilities approach intends to enhance the wellbeing and the quality of life by considering the opportunities of the people, individual abilities, available resources and personal values.[172] Throughout various studies, this approach had been used to analyse the structural inequality in a given society. For instance, Robeyns has used this approach to analyse gender inequality[173] and Rod Hick has undertaken a poverty analysis[174] using the capabilities approach.

The capabilities approach identifies that people must have the freedom to achieve wellbeing and this freedom should be based on the capabilities of the people. This approach is based on two main factors: functioning of the individuals (what individuals value doing or

[171] Johan Galtung, above n 89, 163.
[172] Shela Akbar, Ali Hiranu and Solina Richter, 'The Capability Approach: A Guiding Framework to Improve Population Health and the Attainment of the Sustainable Development Goals' (2017) 23 (1), *Eastern Mediterranean Health Journal* 47.
[173] Ingrid Robeyns, *The Capability Approach: An Interdisciplinary Introduction* (University of Amsterdam, 1st edition, 2003).
[174] Rod Hick, 'The capability approach: insights for a new poverty focus' (2012) *Journal of Social Policy* 8.

value being) and the freedom (the opportunity to accomplish what individuals' value) they have, to pursue the functioning.[175] The next subsection argues that the increased structural violence can be best addressed by using the capabilities approach. There is no previous literature that has used the capabilities approach for this purpose. Hence, this research takes a novel step in introducing requirements to address structural violence and achieve reconciliation by using the capabilities approach.

2.3. (a) The capabilities approach and reconciliation

The capabilities approach and structural violence mainly focus on basic human needs of the individuals. Hence, the two approaches are interlinked. Put simply, on the one hand, the capabilities approach is used for development agendas that focus on basic human needs.[176] It necessarily combines people's basic needs based on their functions and assesses the social arrangements and the well-being of the individuals based on the requirements/concerns of the individuals.[177] On the other, increased structural violence causes different groups to be treated unequally by the existing institutional structure to different groups. In simple terms, the existing institutional structure provides undue advantages to one group whilst ignoring the human needs of the other group. Thus, the capabilities approach which discusses the means for providing basic human needs can be utilised to propose a system that treats different groups equally. Subsequently, structural inequality in the society that leads to increased structural violence can be addressed.

The approaches that have been used to date for reconciliation, such as the truth-seeking mechanisms and hybrid courts do not consider the inequality in the particular society or basic human needs. Rather, these approaches introduce legal processes that identify and punish the perpetrators for the crimes they have committed. Identifying or punishing the perpetrators alone does not make a change in the structural inequality. Chapter 3 deeply examines this notion. In contrast, the capabilities approach considers people's actual freedom to pursue activities and achieve states of life that people deeply value. This is something that goes even beyond human development, since human development only considers the basic needs that people require rather than the actual

[175] Sabina Alkire, 'The Capability Approach and Human Development' (Presentation, Oxford Poverty and Human Development Initiative.

[176] This includes the Millennium Development Goals and the Human Development Index.

[177] Richard J Arneson and Serena Olsaretti, *Desire Formation and Human Good: Preferences and Well-being* (Cambridge University Press, 1st ed. 2006) 3-9.

freedoms that they value in obtaining these needs. Hence, the capabilities approach widens the focus of economic thinking in relation to the preferences of the people and addresses the problem of structural inequality in the society.

The capabilities approach has already been used as a thematic framework in the international development agendas that addresses the issue of basic human needs. This includes: The Human Development Report (HDR) and Millennium Development Goals. The Human Development Report is the annual milestone of the United Nations Development Program (UNDP). [178] It is grounded on the capabilities approach.[179] The Human Development Report, assesses the development of states on the basis of a human development approach. It necessarily focuses on human needs and aims to bring human development to every individual. The capabilities approach had been considered by the UNDP as the most effective way to articulate human development.[180] Similarly, the capabilities approach had been used to measure the United Nations Human Development Index in addition to major human rights instruments.[181]Also human rights and the capabilities approach share the common aim of evaluating the freedom and dignity of the individual.[182]

The capabilities approach has also been used to evaluate the first six goals included in the Millennium Development Goals (eradicate extreme poverty, achieve universal primary education, promote gender equality and empower women, reduce child mortality, improve maternal health, combat diseases).[183] These goals are based on the premise of human needs and have been universally accepted as important for international development. It had also been accepted as being one of the most comprehensive frameworks for development agendas. The capabilities approach had been the thematic framework which had been used to analyse the Millennium Development Goals.[184] The acceptance of Millennium Development Goals demonstrates the importance of the

[178] UNDP, 'Human Development Report 2016: Human Development for Everyone' (United Nations Development Programme, 2017), 85.
[179] Ibid.
[180] Ibid.
[181] Craig, G. et al ed. (2008) *Social Justice and Public Policy*, Bristol: The Policy Press.
[182] Polly Vizard, Sakiko Fukuda-Parr and Diane Elson, 'Introduction: The Capability Approach and Human Rights' (2011) 12 (1), *Journal of Human Development and Capabilities* 1.
[183] Nasir Khan, 'Revisiting the MDG's: Exploring a Multidimensional Framework for Human Development' (2010) *Journal of Asia Pacific Studies* 149.
[184] UN Millenium Project 2005 2011) (Waage et al. 2010).

capabilities approach which was the thematic framework utilised to assess the goals. This evaluation shows how the MDG attempt to address important conditions of human development and; the MDGs represents the capabilities approach in particular. The first goal of MDG is eradicating extreme poverty and hunger. The objective of this goal is to make all affected individuals employed and to halve the proportion who live in hunger. This is the basis of equal economic development. Economic development is an important condition for human development and also in the quest of developing peaceful relations it is important that every party to the conflict is equally privileged from the economic development.

Human development involves both functions of people and the impact of these functions to the people. Hence, people are both beneficiaries and participants in human development.[185] Accordingly, participation in political processes has been a major element in the human development approach. This has been accepted both in human development and the capabilities approach. Thus, victims' participation in the domestic political process is considered as crucial for reconciliation. Chapter 4 to this thesis makes a comprehensive analysis of this claim.

2.3 (b) Political participation of the victims

For the purposes of developing a successful reconciliation mechanism in a post-conflict society, it is essential to satisfy the needs of the victims. Victims' political participation ensures that their views are represented in the political system and this increases the likelihood that their needs are effectively addressed. Hence, this chapter argues that it is a crucial precondition for an effective reconciliation process to increase the political participation of the victims.

In a violent society, citizens' political participation is at a low level.[186] The victims who are in the middle of a conflict are not capable of actively participating in the politics. Further, violence also impacts in "citizens' decision to participate politically, their forms of

[185] Elizabeth Nisbet, 'Background paper commissioned for the Measure of America 2008-2009' (2008) *American Human Development Report*.
[186] Christopher Blattman, 'From Violence to Voting: War and Political Participation in Uganda' (2009) *American Political Science Review*.

participation, and the logic of their vote choice."[187] Political participation is an important element for democracy, rule of law and democratic governance.[188] Political participation along with freedom are regarded by the 2014 Human Development Report as crucial elements for human development.[189] The international community demands equal political participation to eliminate discrimination and marginalisation. The International Covenant on Civil and Political Rights established Article 25 to ensure political participation of every citizen under any form of situation.[190] Many other human rights instruments have also established political participation as an important requirement for democracy, justice and rule of law.[191]

Victims' political participation can avoid the political marginalisation of the victims. This is because when victims actively participate in politics, their own views can be represented. The political participation can either be direct or indirect. Elections, interest groups and political institutions are mechanisms that exist for direct participation while participation in social contexts are indirect forms.[192] For this reason, every party to the conflict, the victims and perpetrators, must have access to political participation, both in relation to elections and the control of power.[193] As a result, this research recognises increased political participation of the victims as a pre-condition for effective reconciliation.

In the Northern Ugandan reconciliation mechanism, traditional justice[194] played a major role which recognized local political perception.[195] Accordingly, to a certain level,

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[187] Sandra Jessica*, Citizens in Fear: Political Participation and Voting Behaviour in the Midst of Violence* (Doctoral thesis, 2014) Department of Political Science in the Graduate School of Duke University 86.

[188] OHCHR, *Equal Participation in Political and Public affairs,* (2017) OHCHR, <http://www.ohchr.org/EN/Issues/Pages/EqualParticipation.aspx>.

[189] UNDP, 'Human Development Report 2014: Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience' (United Nations Development Programme, 2015).

[190] ICCPR Article 25 Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.

[191] See also Article 8 the International Covenant on Economic, Social and Cultural Rights; Article 2 (2) the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; Article 5 and 18 of the United Nations Declaration on the Rights of Indigenous Peoples.

[192] Markus Pausch, 'What is political participation good for? Theoretical debate and empirical data from Austria' (2012) (1) Resistance Studies Magazine.

[193] Carin Norberg and Cyril Obi, 'Reconciling Winners and Losers in Post-Conflict Elections in West Africa' (The Nordic Africa Institute, 2007) 6.

[194] Traditional Justice refers to a type of judicial system which attempts to bring solutions to the local (usually village) communities by using the customary ways of solving issues. The primary aim of traditional justice is to

domestic political will was considered within the reconciliation mechanism. This framework had a positive impact on the Northern Ugandan post-conflict society.[196] By contrast, the Rwandan, East Timorese and Bosnian transitional justice mechanisms had not taken domestic political will as a major concern. Scholars argue that, in the long term, these mechanisms negatively affected the post-conflict societies. These contrasting viewpoints and the results of previous reconciliation mechanisms demonstrate that when domestic political will of the affected population is respected, it is highly probable that there would be a positive impact towards reconciliation. Chapter 4 of this thesis addresses this problem and introduces a mechanism to increase the political participation of the victims.

2.3 (c) Equal economic development

In terms of reconciling the divided communities, economic stability of the victims of the conflict is important. The Capabilities Approach gives prominence to economic development of groups to ensure that their needs are met. The previous reconciliation mechanisms demonstrate that economic development has a positive impact on the victims.[197]A satisfactory income level of the victims can ensure improved life standards of the victims. Given that structural violence is a social condition based in the existing social structure and social institutions, the change of victims' life standards would also change the existing social structure. This would ultimately lower the structural violence levels prevalent in the society.

In his speech at the Global Creative Leadership Summit 2009, Dominique Strauss-Kahn, the Managing Director of the International Monetary Fund, stated that peace and economic stability are intimately entwined.[198] He also stated that "economic instability has

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maintain peace in the community level. See; 'Traditional' Justice Systems in the Pacific, Indonesia and Timor-Leste UNICEF Papua New Guinea: 2009 UNICEF Justice for Children in the Pacific, Indonesia and Timor-Leste, EAPRO Sub-Regional Workshop.

[195] Cecily Rose, 'Looking Beyond Amnesty and Traditional Justice and Reconciliation Mechanisms in Northern Uganda: A Proposal for Truth-Telling and Reparations' (2008) 28 (3), *Boston College Third World Law Journal* 346.

[196] Steven Browning, 'Sustaining Positive Momentum in Northern Uganda' (2007) *The Ambassadors Review*.

[197] Krishna Kumar, *Promoting Social Reconciliation in Post-conflict Societies* (USAID, 1st edition,1999) 17-18.

[198] Economic Stability, Economic Cooperation, and Peace—The Role of the IMF, Remarks by Dominique Strauss-Kahn, Managing Director, International Monetary Fund Remarks by Dominique Strauss-Kahn, Managing Director, International Monetary Fund at the Global Creative Leadership Summit New York City, September 23, 2009 https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp092309 accessed 16th June 2017.

provoked political upheaval, social unrest and conflict."[199] Whilst peace is a necessary precondition for economic growth, economic growth also fosters peace. Hence, to attain peace in any society, it is essential that the victims of war benefit from the economic growth.

Further, Paul Collier identifies that economic growth and diversification can reduce the risk of conflict.[200] For Collier, this lies in the implementation of policies that would increase the income of the victims. Accordingly, this would ultimately result in the reduction of any threat to peace. Economic development of the victims does not only reduce the threat of violence, but also would impact on the development of the cooperation between the parties to the conflict.[201]

The notion that economic development of the victims is a precondition for reconciliation was shown by the reconciliation mechanisms in Bosnia-Herzegovinia and Croatia. These mechanisms implemented three categories of economic development interventions throughout the post-conflict societies: (a) establishing microenterprises and small businesses; (b) creating economic organizations and (c) rehabilitating the devastated physical infrastructure.[202] These efforts resulted in a definite improvement in peaceful relations between the parties. Especially, the reconciliation mechanism implemented processes to include both parties in the economic process making them interdependent.

For instance, in Gornji Vakuff-Uskoplje, a large war affected city in central Bosnia and Herzegovina, with the support of international organizations a small business was established by two women to produce and export knitted garments to Scandinavian countries. The business was run by Muslims and Croats who had been the conflictual parties. The economic development which increased their living standards developed peaceful relations between the parties.[203] Since the business was interdependent, any conflict between them would have negatively impacted on the business which would directly impact on their livelihood. Thus, the economic development has involved peaceful relations which are essential to address structural violence within the society.

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[199] Ibid.

[200] Paul Collier Anke Hoeffler and Dominic Rohner, 'Beyond Greed and Grievance: Feasibility and Civil War' (Working Paper No CSAE WPS/2006-10, 2007).

[201] Paul Collier and Hoefer Anke, 'Greed and Grievance in Civil War' (2001) Oxford Economic Papers 563.

[202] Krishna Kumar, above n 195.

[203] Ibid.

A similar pattern was seen in the Travnik business center in Bosnia and Herzegovina where a farm was developed. Serbs, Croats and Muslims, who were the conflictual parties, were the parties to the business. This business was mainly aimed at building peaceful relations through economic development and interdependence, similar to the knit garment industry in Gorni Vakuff-Eskoplje. Here, the group included to several ethnicities involved in the poultry industry. While one ethnic group produced chicken, the other groups produced eggs and egg cartons. Since the development of the business was based on the business relations of the groups, it was important for them to maintain friendly relations. Subsequently, the economic development, or the intention to develop their economic standards, resulted in maintaining peaceful relations and addressing structural violence.[204]

Thus, economic development of the victims and peace between the conflictual parties are intertwined. It is hence proposed that economic development of the victims is a necessary precondition to mitigate structural violence prevalent in a post-conflict society. The chapter five of this thesis analyses how the economic development initiative in Sri Lanka should be undertaken.

2.3 (c) Timeliness in achieving reconciliation

Having met these preconditions is not sufficient for a successful reconciliation mechanism. Most of the reconciliation mechanisms, including the Rwandan mechanism, is not entirely positive since it has taken an extensive period for its operation. Hence, these preconditions must be met within a reasonable time frame. Accordingly, apart from the two preconditions introduced within the capabilities approach, timeliness of the reconciliation mechanism is proposed as a third element to achieve reconciliation.

Reconciliation mechanisms in the past prove that if the mechanism takes a long period to operate, the intended impact of the mechanism rarely satisfies the victims. The reconciliation mechanism of Rwanda commenced in 1995 and operated until 2014 to deliver its last judgment.[205] The two decades of its operation had little impact on the Rwandan community. Indeed, scholars argue that the negative impact of the mechanism was higher than its positive impact. In the protracted process of 20 years, the victims of war

[204] Ibid.

[205] United Nations Mechanism for International Criminal Tribunals, The ICTR in Brief (<http://unictr.unmict.org/en/tribunal>.

can face many other problems, whilst in some cases, victims will be dead at the time of the operation of the mechanism. Also, in certain cases perpetrators ended up in power over the time. This was the case in both Rwanda and Cambodia. When the perpetrators become part of the government, it is most unlikely that they would hold a trial against themselves. Even if a mechanism had been established, victims cannot expect an impartial trial. Thus, the reconciliation mechanism must reach its end aim within the shortest possible time period.

The Cambodian reconciliation mechanism proves that when the reconciliation mechanism takes long to operate, it will have negative effects. The Cambodian mechanism addressed the violence that emerged three decades ago. Three decades can affect the parties to the conflict in a negative manner. In some occasions, parties might have disregarded the violent events and might have forgotten them over the time. Also, the Cambodian trial showed that a considerable number of Khmer Rouge who are directly affected, and who have directly involved are dead at the time of the operation of the mechanism.[206] Thus, it had experienced negative effects simply because the mechanism was commenced after a considerable time.

Parinaz Kermani in her writings emphasizes the importance of the reconciliation mechanism to operate within a reasonable time period. She states that; "the more time passes, the less likely it is that justice will be done."[207] This explains that justice requires the operation of the reconciliation mechanism to be shorter in period. Failure to operate within the shortest possible timeframe would result in many negative consequences. To avoid any repercussions in its performance, it is essential that the reconciliation mechanism operates sooner and conclude the structural violence within the society.

Conclusion

Implementing a post-conflict reconciliation mechanism involves a rigorous process. This is marked by the difficulty in (correctly) identifying the aim of reconciliation, and necessary requirements for achieving reconciliation. There could be several aims for a reconciliation mechanism. Amongst them, addressing the increased structural violence in the post-conflict society is imperative. Once the increased structural violence is properly

[206] Kermani Mendez Parinaz, 'The New Wave of Hybrid Tribunals: A Sophisticated Approach to Enforcing International Humanitarian Law or an Idealistic Solution with Empty Promises?' (2009) 20 (53), *Criminal Law Forum* 86.
[207] Ibid.

addressed, it is possible to achieve the goals of reconciliation. For the purpose of mitigating the increased structural violence, a reconciliation mechanism should consider the basic human needs of the victims. This is because when basic human needs are unmet by one group in the society, there is structural inequality leading to structural violence. One viable mean of addressing this problem is the capabilities approach. This approach suggests two requirements: increased political participation and economic development of the victims of the conflict. In addition to these two requirements, an added requirement is suggested to implement these requirements in a reasonable timeframe. This is because when a long time is taken, negative consequences will emerge. Delay will ultimately result in weakening the reconciliation mechanism and might also result in the re-emergence of armed violence.

Chapter 3 – Reconciliation through classical mechanisms

Introduction

Every individual has an obligation under international law not to commit crimes that are international in nature. These individuals are responsible to the international community at large and they cannot use state sovereignty as a shield.[208] These obligations come under four main categories: (1) genocide, (2) war crimes, (3) crimes against humanity and (4) crime of aggression.[209] The United Nations has developed several mechanisms to enforce the responsibilities that appear under these categories. These institutions are the products of various political compromises.[210] Various international criminal tribunals (including hybrid courts) are an example. There are certain structural problems within the system of international criminal tribunals.[211] Failure to achieve reconciliation and delivering only a retributive form of justice are some of the main problems. To overcome these problems, and to deliver some restorative form of justice, several other frameworks were introduced. Truth commissions and reparation programs are amongst them.

A UNHCR resolution dated 16th September 2015,[212] urged the Sri Lankan government to establish a truth commission and a hybrid international court to achieve reconciliation.[213] Both these mechanisms are seen by the international community as important mechanisms for transitional justice.[214] However, the potential of these mechanisms to deliver 'thick' reconciliation is doubtful.[215] Implementation of these mechanisms alone did not produce the expected outcome of reconciliation in previous situations.

The purpose of this chapter is to demonstrate that truth commissions and hybrid courts, as proposed by the UNHCR resolution, are unlikely to achieve reconciliation in Sri Lanka. Chapter 2 of this thesis proposed that, to achieve reconciliation increased structural

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[208] Lindsey Raub 'Positioning Hybrid Criminal Tribunals in International Criminal Justice' (2009) 41 *Journal of International Law and Politics* 1014.
[209] Article 5 (1), *The Statute of the International Court of Justice.*
[210] James Cockayne 'The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals' (2015) 28, *Fordham International Law Journal* 616-618.
[211] Okechukwu Oko 'The Challenges of International Criminal Prosecutions in Africa' (2007) 31(2), *Fordham International Law Journal* 350.
[212] Human Rights Council, *Report of the OHCHR Investigation on Sri Lanka* A/HRC/30/CRP.2 Human Rights Council 30th session, Agenda item 2.
[213] Ibid.
[214] Office of the United Nations High Commissioner for Human Rights, Rule of Law Tools for Post-Conflict States – Truth Commissions, 2006.; Office of the United Nations High Commissioner for Human Rights, Rule of Law Tools for Post-conflict States, Maximizing the legacy of hybrid courts, 2008.
[215] Chapter 3 Page 33 of this thesis.

violence in a given society should be mitigated.[216] This chapter will demonstrate that the system of truth commissions and hybrid courts cannot effectively address increased structural violence. For this purpose, the chapter is organized in two sections. The first section analyses the system of truth commissions. It starts by introducing the notion of truth commissions and their positive impacts. Next, it demonstrates that truth commissions alone cannot achieve reconciliation. Then it examines the notion of timeliness introduced in the second chapter and examines whether truth commissions can work within a reasonable timeframe to achieve reconciliation. Through this analysis, this chapter demonstrates that truth commissions alone cannot achieve thick reconciliation.

The second section starts with a brief introduction of the notion of hybrid courts. It then demonstrates that hybrid courts are designed to achieve a retributive form of justice, namely criminal justice. It then demonstrates that as a criminal justice mechanism, hybrid courts are unlikely to achieve restorative justice by way of reconciling the divided communities in a Third World country. The chapter ends with a brief conclusion.

Section I – Truth commissions

3.1 (a) Truth commissions: the reality

Truth commissions, which serve the function of truth-seeking and truth-telling, are major elements of an international reconciliation mechanism.[217] Over the past 25 to 30 years, 30 countries have established truth commissions,[218] in some cases as a process of acknowledgement,[219] and in others as a process of apology and forgiveness.[220] Hiding the truth from the victims and survivors is regarded as a violation of international law.[221] For instance, the Preamble of the International Convention for the Protection of All Persons

[216] Chapter 2 Page 20-22 of this thesis.
[217] See the Rwandan, Timore Leste reconciliation mechanisms which where the international community truth-telling as an element of reconciliation. The Trauma of Truth-telling: Effects of Witnessing in the Rwandan Gacaca Courts on Psychological Health, Journal of Conflict Resolution Karen Brounéus; Columbia Journal of Gender and Law 'Truth and Reconciliation': A Critical Step Toward Eliminating Race and Gender Violations in Tenure Wars Angela Mae Kupenda And Tamara F. Lawson.
[218] The ICRC 'Truth commissions: A Schematic Overview' (2006) 88 (862) *International Review of the Red Cross,* 295.
[219] Martha Minow, 'Between Vengeance and Forgiveness: South Africa's Truth and Reconciliation Commission' (1998) 1 *Negotiation Journal* 338.
[220] Ibid.
[221] Gearoid Millar, Performative Memory and re-victimization: Truth-telling and provocation in Sierra Leone (2015) 8 (2), *Journal of Memory studies 245*.

from Enforced Disappearance affirms that victims shall have the right to truth.[222] In a resolution in 2012, the UN Human Rights Council emphasized the right to truth.[223] The international community also affirms that the victims of violation of human rights have the right to truth and information. For instance, in 2010 the UN General Assembly proclaimed 24th March as the International Day for the Right to the Truth concerning Gross Human Rights Violations.[224] Right to truth has also been emphasized by international and regional legal bodies including the Inter-American Commission on Human Rights, Inter-American Court of Human Rights and Human Right Committee.[225] Thus, it is clear that the international community identifies truth-seeking and truth-telling as a form of right to the victims and survivors.[226]

The support of truth commissions by the international community is mainly due to the positive impact a truth commission can have on a post-conflict society. First, truth commissions allow the examination of past crimes. [227] Examining past crimes is important for preventing crimes in the future.[228] This was demonstrated in a research done by Codepu – a Chilean human rights organization- with the assistance of the Association for the Prevention of Torture.[229] Codepu completed a comparative analysis of five truth commissions in Argentina, Chile, El Salvador Guatemala and South Africa.[230] This research demonstrated that every commission directed its proceedings towards preventive and promotional measures.[231] This is because truth commissions can raise awareness.[232] Truth commissions investigate the story of what has happened, and it is expected that the actual causes for the past abuses can be recognized. To prevent future violations, causes of past

[222] The Preamble provides that, "*Affirming the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person.*"
[223] Human Rights Council, twenty-first session, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, A/HRC/21/L.16, 24 September 2012.
[224] Brianne McGonigle Leyh, 'The Right to Truth in International Criminal Proceedings: An Indeterminate Concept from Human Rights Law' < http://montaigne.rebo.uu.nl/wp-content/uploads/2013/11/McGonigle-Leyh_Libor-Zwaak.pdf>.
[225] Ibid.
[226] James Cockayne 'The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals' (2015) 28, *Fordham International Law Journal* 616-618.
[227] ICTJ, *Truth and Memory (19th June 2017) ICTJ < https://www.ictj.org/our-work/transitional-justice-issues/truth-and-memory>.*
[228] Ibid.
[229] Association for the Prevention of Torture, 'Truth Commissions Can They Prevent Further Violations?' (Executive summaries of relevant papers No 1, Association for the Prevention of Torture).
[230] Ibid 5.
[231] Ibid 10.
[232] Ibid 21.

abuses should be identified. In that way, a clear understanding of the reasons for the emergence of violence can be obtained and particular steps can be taken to avoid similar outbreaks of violence in the future.

Secondly, transitional justice scholars argue that, truth commissions follow a "therapeutic process" which is essential to recover from the violent incidents of the past.[233] For this purpose, transitional justice scholars assert that truth-telling is healing.[234] The term therapeutic process was first coined by Archbishop Desmond Tutu, a pioneer in the implementation of truth and reconciliation commission in South Africa.[235] When a perpetrator, or the victim, testifies as to what happened the individual may feel relieved and satisfied.[236] This is similar to the idea behind confession in Christianity.[237] This process allows the victim or the survivor to forgive the incident.

Truth commissions have also received some criticisms. Firstly, truth-seeking and truth-telling include a complicated and difficult process. For instance, some scholars identify that the success of this process lies in the creation of a collective memory.[238] For these scholars, the collective memory will minimize the number of lies circulating as a public discourse.[239] In reality, however, it is difficult to create a collective memory in a society where communities are deeply divided. In terms of collective memories, a shared perception towards the past that ensure group narratives is required.[240]

This is a particular problem experienced in Sri Lanka due to the different claims made by different parties to the conflict. For instance, in Sri Lanka, Sinhalese claim that the war was commenced by the Tamils, whilst the Tamils claiming that the war was commenced by the Sinhalese.[241] Also, a documentary made by Channel 4, a UK based television channel,

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[233] Special Report 130, United States Institute of Peace, February 2005, 2.
[234] Angela Mae Kupenda and Tamara F. Lawson, 'Truth and Reconciliation: A Critical Step Toward Eliminating Race and Gender Violations in Tenure Wars' (2014) 31(1), *Columbia Journal of Gender and Law*.
[235] See; The Guardian, *Desmond Tutu: a dignified death is our right – I am in favour of assisted dying* (13th July 2014) The Guardian < https://www.theguardian.com/commentisfree/2014/jul/12/desmond-tutu-in-favour-of-assisted-dying>; The Guardian, *Special report: Truth, justice and reconciliation* (25th June 2014) The Guardian < https://www.theguardian.com/world/2014/jun/24/truth-justice-reconciliation-civil-war-conflict>.
[236] Special Report 130, United States Institute of Peace, February 2005, 7.
[237] Anthea Garman, 'Confession and Public life in post-apartheid South Africa: A Foucauldian reading of Antjie Krog's country of my skull' (2006) 324, *Journal of Literary Studies 324*.
[238] Chapman & Ball, 2001: 15; Sooka, 2006: 319.
[239] Ignatieff M (1996) Articles of faith, Index on Censorship 25 (5): 110-122.
[240] Cindy Minarova-Banjac, 'Collective Memory and Forgetting: A Theoretical Discussion' (CEWCES Research Paper No 16. 2018) 3.
[241] Personal communications to the author.

claimed that the government military has violated human rights of Tamil minorities.[242] Tamil minorities in the Tamil held areas also tells the same.[243] However, the government of Sri Lanka claims a different story, stating that the violations were conducted by the Tamil tigers. Sinhalese community also support this claim that the violations were conducted by the Tamil tigers.[244] Hence, it is clear that each community has their own version of the past. Even though truth commissions establish a different version to their story, when the communities are divided, people may not accept the other version of the truth.

Secondly, the idea of truth-telling as healing has not been systematically tested within the discipline.[245] It has been argued that identifying the individual and national level influence of the therapeutic process is undefined.[246] Also, it is not certain as to whether the victim, the survivor or the perpetrator feel better or worse after testifying. In fact, the New York Times in 1997 reported that 60% of the people who testified in the South African Truth and Reconciliation Commission felt worse after testifying.[247] Even though Mendeloff asserts that truth-telling offers a sense of justice which is attached to the moral integrity to the victims, [248] it is still questionable whether the victims can recover from the emotional trauma.

On the other, such a process would cause the victims, their relatives, and survivors emotional and psychological pain. As a result, they will be re-traumatised by reliving the violence they experienced. Gearoid Millar, in his 2015 article, emphasised that truth-seeking and truth-telling mechanism bring not help but provocation.[249] The interviews he had with local people in Sierra Leone proves that the mechanism generated frustration, anger and

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[242] Jonathan Miller, Sri Lanka Tamil Killings 'ordered from the top' Channel 4 News (18th May 2010), < http://www.channel4.com/news/articles/politics/international_politics/sri%2Blanka%2Boption/3652687.html >.

[243] Miguel Candela and Zigor Aldama, The scars of Sri Lanka's civil war, Al Jazeera, (6th June 2016) <https://www.aljazeera.com/indepth/inpictures/2015/12/scars-sri-lanka-civil-war-151221062101569.html>.

[244] Personal communications to the author.

[245] See, Brandon Hambor and Grainne Kelly, 'A Working Definition of Reconciliation' (2004) *Democratic Dialogue*; Oskar Thomas, James Ron, Roland Paris 'The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners' (Working Paper No 1, Centre for Policy Studies, April 2008).

[246] Special Report 130, United States Institute of Peace, February 2005, 2.

[247] Special Report 130, United States Institute of Peace, February 2005, 7.

[248] David Mendeloff, 'Trauma and Vengeance: Assessing the psychological and emotional effects of post-conflict justice' (2009) *Human Rights Quarterly* 31.

[249] Gearoid Millar, above n 190; Gearoid Millar, 'Assessing Local Experiences of Truth-Telling in Sierra Leone: Getting to 'Why' through a Qualitative Case Study Analysis' (2010) 4, *The International Journal of Transitional Justice*. 477–496.

resentment rather than what was really expected: healing, reconciliation or justice.[250] For one Sierra Leonean the truth-seeking mechanism was "adding pepper in my wound" whilst for another it was like "pouring hot water over your head."[251] Another explanatory comment provided by a Sierra Leonean who was a witness to the truth commission mentions that the truth commission is causing "only provocation to those that they seized advantage on during the war… because they just keep talking about it all the time, TRC, TRC, and I don't see what they have done for us."[252] These statements show that the truth-seeking and truth-telling mechanisms cause emotional difficulties rather than helping people to overcome the traumatic incidents of the past.

Thirdly, some scholars argue that truth commissions can result in the recurrence of violent incidents.[253] For instance, Mendeloff emphasises that truth-seeking sharpens the societal divisions which can end up in violence.[254] Later in his writing, Mendeloff points out one possible reason for this claim. He provides that truth-seeking surveys were conducted with the participation of people who administer the reconciliation mechanism rather than the people who experienced the violence or subjected to the reconciliation process.[255] For instance, Alfred Allan in his research does not assess the experience of the local population. Rather, Allan assesses the opinion of the staff of non-governmental organisations and truth commissions. [256]

Fourthly, some scholars establish that truth commissions are effective in post-conflict democratic societies, not in fragile states. For instance, in "Post-Conflict Justice and Sustainable Peace" the authors identify that seeking truth would be an effective and successful mechanism in post-conflict democratic societies which have 'durable peace in the core structure of their governance'. [257] In non-democratic societies, which has no durable peace, truth-seeking could have adverse impact the society. The problem with the majority

[250] Ibid.
[251] Ibid.
[252] Ibid, 246.
[253] David Mendeloff, 'Truth- Seeking, Truth-Telling, and Post conflict Peacebuilding: Curb the Enthusiasm?' (2004) 6 (3) *International Studies Review* 355–380.
[254] Ibid.
[255] Gearoid Millar, above n 218.
[256] Alfred Allan and Marietjie Allan, 'The South African Truth and Reconciliation Commission as a Therapeutic Tool,' (2000) 18(4), *Behavioural Sciences and Law*, 462–463.
[257] Tove Grete Lie, Helga Malmin Binningsbø, and Scott Gates, 'Post-conflict Justice and Sustainable Peace' (Working Paper No. 5, Centre for the Study of Civil War and Norwegian University of Science & Technology, 4191.

of post-conflict societies is that there is no democratic mechanism or has merely weak democratic mechanisms to govern the past atrocities.[258] A state that experienced years of violence in its core structure is not likely to have a strong democratic framework. Furthermore, most armed conflicts in the post-cold war phase emerged from non-democratic states rather than from democratic ones. This is supported by the analysis provided by Brahm who identifies that these states have negative impacts on democratic practices.

Given these considerations, it is clear that truth commissions have both positive and negative outcomes. In terms of establishing a successful reconciliation mechanism by way of a truth-seeking and truth-telling process, at least, two problems are identified.

First, whether truth commissions address the problem of structural violence is doubtful. Chapter 2 to this thesis demonstrated that reconciliation and structural violence are interlinked, and to make reconciliation happen, increased structural violence should be mitigated.[259] However, a truth commission does not mitigate the increased structural violence in a post-conflict society. Second, whether a truth commission can work within a reasonable timeframe is doubtful. Now this chapter turns to examine these two claims deeply.

3.1 (b) Structural violence and truth commissions

As chapter 2 established, structural inequality leading to increased structural violence should be addressed to achieve reconciliation.[260] One major question with reference to a truth-seeking and truth-telling mechanism is, whether this mechanism helps address the increased structural violence in a post-conflict society. In order to assess whether truth-seeking and truth-telling helps addressing this problem, the aims of a truth commission must be examined.

[258] See; Democracy and Conflict Resolution David Kinsella and David L. Rousseau; Reconciliation After Violent Conflict *a Handbook,* International Institute for Democracy and Electoral Assistance 2003; Democracy and Political Party Assistance in Post-Conflict Societies Lotte ten Hoove and Álvaro Pinto Scholtbach NIMD Knowledge Centre.
[259] Chapter 2 page 22- 24 of this thesis.
[260] Chapter 2 page 22 -24 of this thesis.

Every truth commission has its own mandate and works towards different objectives.[261] The mandate may depend, or be based, on the local circumstances and the purpose of the mechanism.[262] These differing objectives can be categorised under three main areas:[263] (1) to establish truth about crimes and events as a historical explanation, (2) protecting, recognising and restoring the rights of victims, and (3) positive social and political transformations.[264]

The first aim of a truth commission is to make a historical explanation of the violent incidents experienced by the people.[265] Mechanisms that are established with this mandate include a descriptive fact-finding process. This process takes cultural, historical and institutional factors of the past abuses and makes an explanatory account. The National Truth Commission in Brazil is a relevant example. The National Truth Commission Law 2011, which established the National Truth Commission in Brazil stipulates three main objectives of the Commission:[266] (1) clarify the facts and circumstances for the violence (2) clarification of authorship for torture executions, forced disappearances and (3) identify the structure locations, institutions and circumstances for the violence.[267] These aims require making an explanatory account of the past incidents. Through this, it is expected to create a collective memory of the past incidents accepted by every party to the conflict.

Now, the question is whether making a historical explanation of the past abuses can address the increased structural violence in a post-conflict society. Chapter 2 established that increased social inequality in a post-conflict society, which may simply be termed as structural violence, leads to violent incidents.[268] This is because there are certain structural factors in the society that cause inequality to the individuals, and these factors can create violence.[269] In a post-conflict society the level of structural violence is high. To address increased structural violence, any mechanism should focus on addressing the

[261] Edurado Gonzales, 'Drafting a Truth Commission Mandate: A Practical Tool' (International Centre for Transitional Justice report, June 2013) 23.
[262] Ibid.
[263] Edurado Gonzales, above n 231, 6.
[264] Ibid.
[265] Ibid.
[266] Article 2 of the National Truth Commission Law 2011.
[267] Ibid.
[268] Chapter 2 page 22-24 of this thesis.
[269] Paul Farmer, 'An Anthropology of Structural Violence' (2004) 45 (3), *Current Anthropology* 305-325.

socioeconomic and political injustice in a given society.[270] Chapter 2 has demonstrated that political participation and economic development of the victims are essential to address the increased structural violence in a post-conflict society.[271]

The nexus between historical explanation of the past abuses and political participation of the victims is questionable. Political involvement requires the people to participate in the policy-making process in the political arena. Truth commission is not within the policy making process of a specific country. Also, truth commissions are not designed to achieve the purpose of increased political participation of the victims. Hence, victims' participation in the truth commission as witnesses cannot be regarded as political participation. However, a truth commission will not meet this requirement since they are designed to hear the grievances and the stories of the victims and perpetrators and no political decision will be made by such a mechanism. In fact, decisions made by truth commissions are non-binding in nature. Hence, it is less likely that the individuals get to involve in a decision-making process by participating in a reconciliation mechanism.

The second aim of a truth commission is to protect, recognise and restore the rights of the victims.[272] For instance, Edurado Gonzales identifies several rights that were implemented by truth commissions.[273] This includes rights attached to dignity of the victims, wellbeing, psychological healing and improving the situation of the victims. In Peru, the Article 2 to the Supreme Decree of the Truth and Reconciliation Commission 2001 detailed dignification of the victims and their family members as an important aim of the commission. It is doubtful whether restoring the rights can help address increased structural violence. It is not sufficient for the mechanism only to focus on the rights of the victims. Rather, concerns regarding inequality must be addressed by the mechanism.

Positive social and political transformations of the victims is the third aim of a truth commission. [274] After a violent incident, especially when the society has undergone serious human rights violations, it is difficult for the victims and survivors to get used to a democratic frame of governance. Even though democratic institutions are implemented,

[270] Lara Waldorf, 'Transitional Justice and DDR: The Case of Rwanda' International Centre for Transitional Justice, (New York, June 2009) 171-186.
[271] Equal economic development, political participation of the victims, grassroots decision making in the reconciliation process, positive relationships between the victims and perpetrators and timeliness.
[272] Edurado Gonzales, above n 231, 6.
[273] Ibid.
[274] Ibid.

people will not be ready for a democratic change. Hence, it is essential that positive social and political transformation happens in a post-conflict society. In Sierra Leone, the article 6 to the Truth and Reconciliation Act provided that the purpose of establishing the Truth and Reconciliation Commission is to "promote healing and reconciliation." In the process of healing what is more essential is the social and political transformation of the victims. The victims' attitude should change to a positive manner to make sure that healing takes place.

3.1 (c) Timeliness and truth commissions

A successful reconciliation mechanism must work within a reasonable timeframe.[275] Practically, truth commissions take a considerable time to operate. This is demonstrated in every aspect of the truth commission including establishment, implementation and working towards the recommendations. [276] This is due to the nature and scope of its work: testifying the stories of the victims, survivors and perpetrators, verifying the testimonies in terms of the evidence available and providing amnesties to the victims and survivors. Implementing a truth commission for truth-seeking and truth-telling also takes an extended period of time.

The Office of the United Nations High Commissioner for Human Rights, in its 2006 report, emphasises the lengthy process of establishing a truth commission in general.[277] This report demonstrates that prior to the establishment of a truth commission, several measures should be taken at the national level. This will include, "workshops, seminars and opportunities to debate and suggest specific components of mandate and design."[278] There could be a series of workshops for the same subject.[279] It is the same with seminars and debates. According to the mandate provided by these events, the structure of the truth commission has to be designed. Hence, the initial stage of implementing a truth commission generally consumes a considerable time period.

The time-consuming nature of a truth commission is also demonstrated in the operation of the truth commissions. There were approximately forty-five major

[275] Chapter 2 page 33 of this thesis.
[276] Office of the United Nations High Commissioner for Human Rights, Rule of Law Tools for Post-Conflict States – Truth Commissions, 2006 7.
[277] Ibid.
[278] Ibid.
[279] Personal experience of the author.

reconciliation processes held between 1974 and 2016.[280] These processes have taken an extended period of time to operate. For instance, in Uganda the Commission of Inquiry into Violations of Human Rights (the truth commission) was implemented in May 1986.[281] Covering 608 deponents,[282] this commission revealed the incidents for the period of October 1962 to January 1986. The commission operated almost a decade and the final report was completed in 1995. Further, the Rwandan transitional justice mechanism demonstrates the time consumption of a truth-seeking mechanism. The genocide of Rwanda officially commenced with the shooting down of the plane in which the President Juvenal Habyarimana travelled in April 1994. ICTR continued its trials until 2014 and reports show that some evidence was collected even at a later stage. This shows that even 20 years after the violence, the mechanism continued with truth-seeking. Also, the Rwandan mechanism had no separate body for truth seeking and truth telling.[283] Instead, a historical explanation of the past abuses was done by the tribunal proceedings itself. This mechanism was operated for a period of two decades and it has proven that (even) two decades is insufficient for truth-seeking and truth-telling.

The completion of the report of the truth commission does not mean that the mission of the truth commission is completed. The reconciliation mechanism can take further time to deliver the ultimate outcome. In some cases, even after delivering the report, the truth commission operated to investigate further actions. For instance, in South Africa, the Truth and Reconciliation Commission was implemented in 1995.[284] It consisted of four national members and three international members and covered the gross violations of human rights for the period of 1960 to 1994. Even though the commission has completed its primary reports in 1998, it operated for several further years to complete amnesty hearings. As a result, the overall agenda took an extended period of time.

The positive outcome of truth commissions is undoubted. However, the impact of truth commissions towards reconciliation is doubted. Particularly, truth commissions tend not to address the problem of structural violence which is central to reconciliation. Furthermore, truth commissions can take a long period to operate, making it more

[280] United States Institute of Peace, *Truth Commission Digital Collection,* (16th March 2011) United States Institute of Peace <https://www.usip.org/publications/2011/03/truth-commission-digital-collection>.
[281] Steven Browning, 'Sustaining Positive Momentum in Northern Uganda' (2007) *The Ambassadors Review*.
[282] Ibid 308.
[283] Ibid, 298.
[284] Ibid.

challenging to solve the reconciliation problem. Further, such mechanism brings emotional and psychological pain rather than being a psychological therapy. In some cases, this mechanism re-traumatises the victims spreading fear and vengeance causing more trouble. Thus, it can be concluded that truth commissions alone cannot achieve reconciliation, and it must be supplemented with an alternative mechanism.

Section II – Hybrid courts

Some countries use criminal prosecution in combination with truth commissions to address mass human rights violations.[285] For instance, In Sierra Leone and East Timor truth commissions were designed to complement criminal proceedings.[286] In its resolution to Sri Lanka,[287] the United Nations also urged the implementation of a hybrid court (in addition to a truth commission) to comply with criminal prosecutions.[288]

Simply, a hybrid court is a criminal justice system which is implemented in consultation with domestic and international communities for the examination of serious violations of human rights. The notion of a hybrid court was introduced to international criminal law at the end of 1990s.[289] In East Timor first and then in Kosovo, Sierra Leone, Cambodia and other post-conflict countries, a series of hybrid courts were implemented.[290] When the domestic government has inadequate local capacity to deal with past abuses, or the credibility of the domestic courts are impugned, a hybrid court is often recommended.[291] This system differs from ad hoc criminal tribunals, like the ICTR and ICTY. Because, ad hoc criminal tribunals claim international dominance over the national courts and they tend not

[285] Okechukwu Oko above n 209.
[286] Carten Stahn, 'Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission in East Timor' (2001) 95, *Journal of International Law* 952-953.; William Schabas, 'A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' (2004) 15, *Criminal Law Forum*.
[287] Human Rights Council, *Report of the OHCHR Investigation on Sri Lanka* A/HRC/30/CRP.2 Human Rights Council 30th session, Agenda item 2.
[288] Human Rights Council, *Report of the OHCHR Investigation on Sri Lanka* A/HRC/30/CRP.2 Human Rights Council 30th session, Agenda item 2.
[289] http://www.pict-pcti.org/courts/hybrid.html
[290] Carten Stahn, 'Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission in East Timor' (2001) 95, *Journal of International Law* 952-953.; William Schabas, 'A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' (2004) 15, *Criminal Law Forum*.
[291]Ethel Higonnet, 'Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform' (2005) 3 (1), *Yale Law School Legal Scholarship Repository* 5.

to follow the domestic rules.[292] In contrast, hybrid courts are often implemented with domestic consultation. As a result, hybrid courts tend to accept the domestic sovereignty to a certain extent.

This system has a feasible mechanism to combat impunity; because criminal prosecution can be utilized to deter perpetrators of crimes.[293] However, it is doubtful whether this mechanism can be utilized to promote reconciliation in a post conflict society. Now this chapter turns to examine the notion of hybrid courts and their impact in promoting reconciliation.

3.2 (a) The notion of hybrid courts

Hybrid court, as its name implies, has a structure which is mixed with international and national elements. In terms of the institutional apparatus, staff (mainly judges and prosecutors) and the applicable law, these tribunals have a mixed system.[294] Both international community and domestic community assist in the implementation and running of these courts. As a result, decisions that are delivered from hybrid courts have a form of mixed justice.[295] Given that hybrid courts have features of both domestic and international courts, it is expected that the deficiencies of both international and domestic courts can be mitigated and the benefits of the two systems can be retained. [296] Hence; hybrid court is suggested as an improved mechanism to provide sufficient attention to domestic factors like staff (judges, prosecutors and other staff) and domestic laws while international norms and resources can also be implemented at the same time.[297]

Two main advantages have resulted in the increased acceptance of hybrid courts by the international community: (a) local ownership of the criminal justice system and (b) proximity to the crimes.[298] Compared to the international military tribunals (including the

[292] Caitlin E Carrol, 'Hybrid Tribunals are the Most Effective Structure for Adjudicating International rimes Occurring Within a Domestic State' (2013) 90 (5), *Law School Student Scholarship* 5.
[293] Okechukwu Oko above n 209, 347.
[294] Lindsey Raub 'Positioning Hybrid Criminal Tribunals in International Criminal Justice' (2009) 41, *Journal of International Law and Politics* 1016.
[295]Laura Dickinson, 'The Promise of Hybrid Courts' (2003) *American Journal of International Law* 295.
[296] Paul Bennetch, Matthew Sellers and Sean McGuire, 'Improving Hybrid Tribunal Design: Domestic Factors, International Support, and Court Characteristics' Stanford Law School. 6 <https://www-cdn.law.stanford.edu/wp-content/uploads/2016/07/Bennetch-Sellers-McGuire-Improving-Hybrid-Tribunal-Design-Domestic-Factors-International-Support-and-Court-Characteristics.pdf>.
[297] Ibid.
[298] Ibid, 4.

International Criminal Court) and ad hoc criminal tribunals, hybrid courts allow the advancement of the domestic criminal justice system.[299] This happens mainly due to two factors. On the one hand, the increased emphasis given to the domestic factors by this system allows for local ownership.[300] On the other, hybrid courts are implemented within the domestic mechanism itself, rather than in an international setting. As a result, it is likely that the local population experience their representation in the system.[301] Besides, hybrid courts are implemented in the domestic jurisdiction where the atrocities took place. Hence, people's proximity to the system is very high.

Despite these benefits, hybrid courts also face certain challenges. Reconciling the international law and domestic law is one central challenge encountered by hybrid courts. [302] This is because, sometimes the domestic law contradicts international law. To reconcile the two legal systems, hybrid courts should carefully consider both the legal systems. For instance, the UN Secretary General's Guidance Note for Transitional Justice emphasises the importance of considering the unique country contexts in the process of implementing a transitional justice process.[303] Accordingly, the domestic reforms should be supported, and national human rights institutes should be given a considerable attention. In terms of thick reconciliation, reconciling the domestic law and international law is important. As explained in the chapter 1, thick reconciliation requires to address the structural causes for discrimination and marginalization.[304] For this, specific legal provisions in the domestic system must be reformed. This process takes a considerable effort. For instance, hybrid court in East Timor experienced difficulties in identifying the applicable legislation that is consistent to international legal standards.[305] This is because, a specific regulation provided that the law of East Timor would apply in the SPSC as long as it does not contradict with

[299] Ibid.
[300] Ibid.
[301] Ibid, 7.
[302] David Luban, 'Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law' (Georgetown Law Faculty Working Papers, University of Georgetown, July 2008).
[303] Third guiding principle.
[304] Paul Seils, 'The Place of Reconciliation in Transitional Justice – Conceptions and misconceptions' (2017) *ICTJ briefing paper* 1.
[305] Carten Stahn, 'Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission in East Timor' (2001) 95, *Journal of International Law* 952-953.; William Schabas, 'A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone' (2004) 15, *Criminal Law Forum*.

international legal standards.[306] As a result, a huge effort was taken by the legal experts to reconcile the problem between the intersection of domestic law and international law.[307]

Capacity building is another central challenge experienced by the system of hybrid courts. Capacity building includes strengthening justice and rule of law in the domestic jurisdiction for delivering justice and public confidence in the long run.[308] This means that the hybrid court must ensure tangible capacity building within the victims. For this, victims must have faith in the justice institutions; because as long as the public have faith and trust in the justice institutions, it is easier to implement a new criminal justice mechanism to try the perpetrators. However, building public trust and faith towards the justice institutes is a long process which should be developed within the justice institutes themselves. In post-conflict fragile states, justice institutions tend to take a corrupt form and the public trust is low. For instance, Cerone and Baldwin argue that judges were unable to build up an impartial system of legislation in post-conflict societies. [309] This means that the international judges did not increase the capacity of the domestic court system.[310] This can also result in having low public trust of the people.

The main question for this thesis, however, is whether hybrid courts can help address the problem of reconciliation in a post-conflict society. Clearly, as a criminal prosecution mechanism the main purpose of establishing a hybrid court is retributive justice. It has long been established that criminal prosecution cannot be utilized to attain social stability.[311] For instance, criminal prosecutions were conducted for more than ten years in South Africa.[312] However, the impact of these mechanisms on social stability and reconciling intergroup hostilities were unnoticeable.[313] This research has identified at least three main factors that a criminal justice system can result in restricting intergroup reconciliation in a post-conflict society.

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[306] Ibid.

[307] David Bjorgvinsson, *The Intersection of International Law and Domestic Law* (Edward Elgar Publishers, 1st edition, 2015).

[308] Jane Stromseth, 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?' (2009) 1, *Hague Journal on the Rule of Law* 1-87, 89.

[309] John Cerone and Clive Baldwin, 'Explaining and Evaluating the UNMIK Court System' in *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford Publication, 1st edition, 2004) supra note 56.

[310] Ibid.

[311] Okechukwu Oko above n 209, 350.

[312] Ibid, 350.

[313] Ibid.

Firstly, it is difficult for a criminal justice system to address the problems which were caused by the civil war. Particularly, in the aftermath of the civil war, victims experience severe socio-economic problems. For instance, international reports indicate that civil war caused more than 90,000 people in the North and the East of Sri Lanka to be displaced.[314] The Sri Lankan civil war devastated houses and infrastructure facilities. The livelihood of the victims was heavily affected by the war and that caused severe poverty problems.[315] Some news reports further indicate that post-conflict justice institutions tend to be corrupt. These corrupt institutions can cause severe problems for the victims to seek justice through these institutions.[316] A criminal justice system which would be established to try the perpetrators of mass human rights violations cannot be used to address problems of displacement and poverty.

Secondly, criminal trials can bring adverse impacts on social relationships. For instance, Benjamin Fink rightfully analyses that retribution causes the individuals to accuse and counter accuse the individuals which may sacrifice the possibility of reconciliation.[317] Put simply, a criminal justice system allows the victims to prosecute the alleged perpetrators. In this process, victims risk being retraumatized by the bad incidents they underwent and that can adversely affect the restorative justice process to achieve reconciliation. This thesis does not refuse the criminal justice processes which is important to deter the future crimes. However, before implementing such process, the socio-economic and political status of the victims must be properly addressed. Criminal justice process should be implemented as the second step, once the socio-economic and political wellbeing of the victims are ensured.

[314] International Crisis Group, *Sri Lanka's Conflict Affected Women*: < with the Legacy of War' (20th February 2013) International Crisis Group, < https://www.crisisgroup.org/asia/south-asia/sri-lanka/sri-lanka-s-authoritarian-turn-need-international-action>.
[315] Chapter 2 page 24 and 33 of this thesis.
[316] Chapter 2 page 19 of this thesis.
[317] Jason Benjamin Fink, 'Deontological Retributivism and the Legal Practice of International Jurisprudence: The Case of International Criminal Tribunal for Rwanda' (2005) 49, *Journal of African Law* 101.

Conclusion

The international community recognises truth commissions and hybrid courts as two major means of achieving transitional justice. In terms of the type of justice sought, these two mechanisms are different. While hybrid courts focus on retributive justice, truth commissions aim for a restorative form of a justice. However, both mechanisms are expected to reconcile divided communities in a post-conflict society. Both of these mechanisms offer some benefits to the transitional justice process. From being a therapeutic process to making a historical explanation of past incidents, truth commissions assist the transitional justice process. Hybrid courts are useful as a system of justice linked to the local population. Also, the benefits of both a domestic mechanism and an international investigation is offered by a hybrid court.

Despite these benefits, the contribution of these mechanisms to achieve 'thick' reconciliation in a post-conflict society is limited. Truth commissions, though intend to achieve a restorative form of a justice but do not focus on the problem of increased structural violence that is central to any reconciliation process. Also, the excessive time period taken by a truth commission to operate can negatively affect efforts towards reconciliation.

Hybrid courts, on the other hand, do not intend to achieve a restorative form of a justice. Rather they aim to bring criminal justice in a post-conflict society. Whilst, criminal justice is important, it alone cannot address the problem of reconciliation. There are few other problems that restrict effort for reconciliation through a criminal justice system. Not answering the problems caused by the civil war and bringing adverse impacts on social relationships can result in restricting efforts for reconciliation. Similar to truth commissions, hybrid courts can also take a considerable time to operate. Given the circumstances, it can be concluded that whilst truth commissions and hybrid courts are important for a transitional justice mechanism, these mechanisms must be supported by an alternative mechanism that will enable 'thick' reconciliation in a post-conflict society.

Chapter 4 - Power sharing experience and reconciliation: Lessons for Sri Lanka

Introduction

Chapter 2 proposed that victims of war should have increased political participation to achieve reconciliation. This is because, lack of attention given to the political demands of minority groups has been a serious concern in multicultural societies.[318] Chapter 3 demonstrated that classical mechanisms for reconciliation experience serious shortcomings in increasing the political participation of the victims and reconciling the divided communities. To overcome this problem, this thesis proposes the implementation of an additional mechanism. As explained in previous chapters, there is deep inequality in divided communities. Legal and political scholarship has suggested several means to address this inequality. One of the most viable means is the establishment of a power sharing mechanism.[319] This chapter advances the idea that a power sharing mechanism can help achieving the central objective of this research, which is to propose a successful reconciliation mechanism for Sri Lanka, that would particularly address its Third World conditions

For a country like Sri Lanka, where different ethnicities live in different regions, a power sharing mechanism tends to give the minority groups the access to state power through a provincial mechanism. In this way, every ethnic group may receive the opportunity to reach their communal goals and interests. Also, this system can assist in addressing the unaddressed political problems and demands of minority groups. Having addressed the political problems of the minority groups (and with equal representation in domestic politics) it is less likely for them to have antipathy against the majority ethnic groups. As a result, the problem of structural violence and the problem of reconciliation can be better addressed by a power sharing mechanism.[320] Previous chapters have established the idea that the central problem that restricts reconciliation in a Third World post-conflict

[318] Andrzei Jakubowski, *Cultural Rights as Collective Rights, an International Law Perspective* (Brill Nijhoff, 7th edition 2016) 1.

[319] Ian O'Flynn and David Russel, *Power Sharing: New Challenges for Divided Communities* (Pluto Press London,1st edition 2005) 1.

[320] For the purpose of this section, a power sharing mechanism is described as a political solution implemented in a multicultural society which divides the governmental responsibilities among different communal groups to represent rival political interests in the government.

society is structural violence. Thus, this chapter demonstrates that a strong power sharing mechanism helps addressing this central problem in a Third World country.

This chapter is organised in three sections. The first section identifies the existing power sharing mechanism in Sri Lanka and identifies the weaknesses of that system. Following that, the second section to the chapter introduces the fundamental principles of power sharing. Then it examines the reasons for implementing a power sharing mechanism for political participation and reconciliation. By analysing the weaknesses of the Sri Lankan power sharing mechanism and identifying the elements of power sharing, the third section proposes recommendations for a successful power sharing mechanism in Sri Lanka.

Section I – Existing Power Sharing Mechanism in Sri Lanka

4.1 (A) Efforts to implement a power sharing mechanism in Sri Lanka and weaknesses

The concept of power sharing is not new to the legal, political and constitutional structure of Sri Lanka. Since colonial rule, the British have implemented power sharing provisions in the Sri Lankan constitutional structure. The first constitutional reform provided by the British to Sri Lanka, the Colebrook Cameron Reforms of 1833 included power sharing principles to a certain extent. This is evident from the fact that the legislative power was divided among the British and the Sri Lankans.[321] This legislative power of the Sri Lankans was further shared between the Sinhalese, the Tamils and the Burghers. The subsequent constitutional reforms introduced by the British: the Crewe-McCullum Reforms of 1912, the Manning Reforms of 1922, the Manning – Devonshire Reforms of 1924, and the Soulbury Constitution of 1948 further expanded the power sharing principles by increasing the number of representatives in the legislative councils. For instance, in terms of the Colebrook Cameron reforms, three members represented around 6500 Europeans, whilst around 2,550,000 Sinhalese were represented by two members and 1,125,000 Tamils, 250,000 Muslims, 25,000 Burghers were represented by one member for each ethnic group.[322] Since sufficient representation was not available under Colebrook Cameron reforms, later reforms increased the number of representatives for the legislative council. In that sense, the British

[321] Mangalaruby Sivakumar, 'The Recommendation of the Colebrooke-Cameron Commission 1833 marked the Beginning of a new Era in the History of Sri Lanka -a View' (2015) 1 (26), *Asia Pacific Journal of Research* 15.
[322] Sam Wijesinghe, *Systems of Government in Sri Lanka* (07th May 2007) The Island <http://www.island.lk/2000/05/07/politics.html>.

reforms tried to provide some access to legislative power for every ethnic group.

After independence (1948), several efforts were made to implement a power sharing mechanism in Sri Lanka. One of these efforts is the bringing up of the idea of "Tamil Homeland" by the Federal Party (Tamil based political party) in 1950s.[323] The then Prime Minister. S.W.R.D. Bandaranaike tried in this way to address the Sinhalese-Tamil violence which emerged after the implementation of Official Languages Act. Accordingly, Bandaranaike negotiated with Tamil parties and agreed to devolve power to regional councils.[324] However, this attempt was not successful due to the continuous agitations held by the Sinhalese patriotic society (including the Buddhist monks) against the decision of the Prime Minister.

Another striking effort was the Devolution Bill proposed by the then President Chandrika Kumarathunga in 2000. This bill proposed the establishment of a quasi-federal union of regions and to implement a mixed voting system.[325] It also proposed to devolve responsibilities and powers attached to important areas like finance, law and land to the quasi federal union of regions.[326] This bill would have resulted in high level political autonomy for the Northern Tamils.[327] However, it was not enacted into law because President Kumarathunge did not achieve the necessary two-third majority in Parliament.[328] Thus, it is clear that efforts to bring power sharing mechanisms to Sri Lanka was not supported by majority of population.

The most prominent effort to implement power sharing principles in Sri Lanka is the implementation of the 13th amendment to the Second Republican Constitution of 1978 which was enacted in 1987. This chapter now turns to examine the existing laws that stipulates power sharing principles in Sri Lanka, including the 13th amendment.

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[323] Thiruni Kelegama 'Impossible Devolution? The Failure of Power-Sharing Attempts in Sri Lanka' (2015) 39(3), *Journal of Strategic Analysis,* 239.
[324] Ibid.
[325] Ibid.
[326] Radhika Coomaraswamy, 'The Politics of Institutional Design: An Overview of Sri Lanka' in Sunil Bastian and Robin Luckham *The Politics of Institutional Choice in Conflict-Torn Societies* (Zed Books, New York, 2003) 165.
[327] The Economist, *Sri Lanka Backs away from Devolution* (10th August 2000) The Economist <https://www.economist.com/node/343153>.
[328] K. Ratnayake, *Sri Lankan Government Crisis Deepens as Kumaratunga 'postpones' Constitutional Reform Bill* (9th August 2000) World Socialist Web <https://www.wsws.org/en/articles/2000/08/slpk-a09.html>.

4.1 (B) The current legislation on power sharing in Sri Lanka

The existing legislation that regulates power sharing principles in Sri Lanka is the 13th amendment to the constitution and the Provincial Councils Act No. 42 of 1987. These statutes establish a similar structure to the Indian model but support a constitutionally-entrenched unitary system.[329] Article 154 (a), as entrenched by the 13th amendment, provides that each province in Sri Lanka shall have a Provincial Council,[330] and the members for each province shall be elected by way of a Provincial Council election.[331] The election must be held according to the provisions stipulated under the Provincial Council Election Act No. 2 of 1988. The number of members to the Provincial Councils will be determined by the area and the population of each province.[332] In terms of these legislations, the then President J.R Jayawardane in 1988 established Provincial Councils for the first time in the nine provinces in Sri Lanka by order 3RI.[333] Due to administrative difficulties and influences of the terrorism, some of the Provincial Councils including the Northern Provincial Council was not operating. After the Northern Provincial Council election held in 2013, the total of nine Provincial Councils are currently in effect.

The constitution provides that each Provincial Council shall have a Governor,[334] a Chief Minister and a Board of Ministers.[335] Article 154P of the Second Republican Constitution (as entrenched by the 13th Amendment) provides for the establishment of a High Court for every Province, where the judges to these courts will be nominated by the Chief Justice (of the Supreme Court of Sri Lanka).[336] The Constitution also provides that a Provincial Council continues for a period of five years unless dissolved by the Governor beforehand.[337]

In order to make clear the powers vested in the national government and the Provincial Councils, the Thirteenth Amendment has created three lists under the Ninth Schedule of the Constitution: Provincial Council List, Reserved List and the Concurrent

[329] K.M.De Silvam, 'Power sharing arrangements in Sri Lanka' (Working Paper No 4, Netherlands Institute of International Relations, 2001) 17.
[330] Second Republican Constitution, 1978 (Sri Lanka), Article 154A (1).
[331] Second Republican Constitution, 1978 (Sri Lanka), Article 154A (2).
[332] G.R.T. Leitan, 'Sri Lanka's Institutes of Local Governance: their Present Statutes and Possibilities for the Future' (Governance No.1 2001), 2.
[333] *Jayantha Wijesekara and others v Attorney General and others* [2006] 243 SC (Sri Lanka) 6.
[334] Second Republican Constitution, 1978 (Sri Lanka), Article 154B (1).
[335] Second Republican Constitution, 1978 (Sri Lanka), Article 154A (3).
[336] Second Republican Constitution, 1978 (Sri Lanka), Article 154P (2).
[337] Second Republican Constitution, 1978 (Sri Lanka), Article 154E.

List.[338] The Provincial Council List recorded the powers vested solely on the Provincial Council which includes: implementation of provincial economic plans and development plans, education, local authorities for the purpose of village administration and local government, housing and construction, roads and bridges, agriculture, social services, co-operative undertakings and rehabilitation.[339] The reserved list provides for the powers retained by the central government[340] and retained a large number of important powers that are essential for the running of the government. Foreign affairs, justice and defence are amongst them. The concurrent list details the powers shared between the national government and the provincial government.[341] This includes, planning, education, higher education, social services and rehabilitation. In the event where the decisions of the provincial councils contradict with the decisions of the national government, the choice of the national government prevails.[342]

4.1 (C) Weaknesses of the existing mechanism

These provisions display some qualities of a good power sharing mechanism. However, there are a number of factors that restricts a successful power sharing mechanism in Sri Lanka. Firstly, the thirteenth amendment assigned only a limited number of powers and responsibilities to the Provincial Councils including rural development and provincial development. These limited powers are also restricted by various other legal provisions implemented by a statute of the national Parliament. For instance, the 'Divineguma Bill' implemented in 2013,[343] and National Transport Commission Act No. 37 of 1991 can be identified.

The Divineguma Bill included subjects like rural development, implementation of development plans, rehabilitation, co-operative undertakings and agriculture. Each of these subjects comes under the Provincial Council List. By including them, the Divineguma Bill has allowed the national government to access those subjects.[344] In this way, the national government has used an alternative way to access the powers of the Provincial Council

[338] Second Republican Constitution, 1978 (Sri Lanka), Ninth Schedule
[339] Ibid.
[340] Second Republican Constitution, 1978 (Sri Lanka), 13th Amendment
[341] Ibid.
[342] Second Republican Constitution, 1978 (Sri Lanka), Article 154G
[343] Center for Policy Alternatives, 'Note on the Divineguma Bill' (Working Note, Center for Policy Alternatives, 2013) 6.
[344] Ibid.

without amending the thirteenth amendment. In terms of Article 154 (G) of the Constitution, in the event where the decisions of the National Government and Provincial councils are inconsistent, decision of the National Government prevail. As a result, powers that are originally vested on Provincial Councils were dissolved and the national government has taken excessive power over these provisions. For another example, item eight of the Provincial Council List provides powers to enforce laws pertain to road passenger carriage services. This power was restricted by the enforcement of the National Transport Commission Act No. 37 of 1991 by the national Parliament.[345]

Secondly, the position of the Governor limits the exercise of the powers by the Provincial Councils. On the one hand, Governor has obtained excess power in his hands and acts like the head of a Provincial Council. A bill passed by the Provincial Council requires the Governor's assent for it to be enforced as a statute.[346] The Governor also has the discretion to return it to be reconsidered, with or without any recommendations for amendment.[347] Even after the bill is amended and presented for the assent of the Governor (for the second time), he has the discretion to reserve it for the reference of the President of the Supreme Court, to inquire whether the bill is consistent with the provisions of the constitution.[348] As a result, the Governor acts as a check on the legislative powers of the Provincial Councils.[349] In addition to this, the Governor also has the power to prorogue the Provincial Council from time to time,[350] to dissolve the Provincial Council,[351] and to pardon convicted persons within the Governor's province.[352] These provisions grant excessive power to the Governor and limits the powers of the Provincial Councils.

Furthermore, the Governor is likely to act according to the will of the President of the National Government. In terms of Article 154 (B) (2) of the Constitution, the Governor for each Provincial Council is appointed by the President of the national government and holds office 'during the pleasure of the President.'[353] Fort this reason, the Governor is a

[345] Uditha Egalahewa and Mahen Gopallawa, *Devolution of Powers: The Sri Lankan Experience* (The Kamalasabayson Foundation, 1st edition, 2009), 40.
[346] Second Republican Constitution, 1978 (Sri Lanka), Article 154H (1) a.
[347] Second Republican Constitution, 1978 (Sri Lanka), Article 154H (2) a.
[348] Second Republican Constitution, 1978 (Sri Lanka), Article 154H (3) a.
[349] Asanga Welikala (ed), *A New Devolution Settlement for Sri Lanka* (Centre for Policy Alternatives, 1st ed. 2016) 14.
[350] Second Republican Constitution, 1978 (Sri Lanka), Article 154 (B) (8) (b).
[351] Second Republican Constitution, 1978 (Sri Lanka), Article 154 (B) (8) (c).
[352] Second Republican Constitution, 1978 (Sri Lanka), Article 154 (B) 9.
[353] Second Republican Constitution, 1978 (Sri Lanka), Article 154 (B) (2).

representative of the President of the National Government in the Provincial Councils. There are situations where the Governors were expressly ordered to obey the will of the President of the National Government. For instance, when the Governor Bakeer Marker did not obey the orders of the President, the President threatened: "get ready to relinquish the governorship."[354] As a result "the Governor reluctantly agreed to do as the President wished."[355]

Thirdly, the powers and responsibilities detailed in the three lists are sometimes unclear. This is because some of the responsibilities are scheduled in two lists. For instance, responsibilities like agriculture, social services and rehabilitation are listed under both Provincial Council List and Concurrent List. Hence, both the national government and Provincial Councils have equal (yet unclear) power on the same subject and that results in confusion. Also, since the constitution provides that the decision of the national government shall prevail at any event of inconsistency, it is highly likely for the national government to influence the Provincial Councils. While both the national government and Provincial Councils have institutions for implementation of laws there is no consensual decision-making process. Hence, neither the national government nor the Provincial Councils are aware of the policies of their counterparts. For instance, most of the Provincial Councils have a ministry for Agriculture/ Agrarian Development in addition to the Ministry of Agriculture in the National Government. Over the last few years, various problems emerged in terms of agriculture in Sri Lanka.[356] One major reason for this is the contradictory decisions taken by the national government and the Provincial Councils due to lack of awareness of each other's processes.

For another example, most of the Provincial Councils have a Ministry for children's and women's affairs. The national government runs the Ministry of Women and Child Affairs whilst a number of other institutes have been established for the same purpose, including the National Child Protection Authority, the Department of Probation and Childcare Services, the Children's Secretariat and the Women's Bureau. However, there is no process to make consensus decisions between the national government and the Provincial Councils.

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[354] Austin Fernando, *Governor or Chief Minister* (8th December 2013) The Sunday Leader, <http://www.thesundayleader.lk/2013/12/08/governor-or-chief-minister/>.
[355] Ibid.
[356] Roshantha Athukorala, *Sri lanka Heading for an Agricultural Issue in 2017?* (3rd January 2017) Daily FT < http://www.ft.lk/columns/sri-lanka-heading-for-an-agricultural-issue-in-2017/4-588715>.

Any decisions by the provincial ministries can be overruled by the national government ministries in order to pursue their own agenda. The main impact of this is the failure of the initiatives of both the national government and the Provincial Councils.

This is evident from the response of the Delegation of the Provincial Councils at the Conference of Provincial Councils on a New Devolution Settlement for Sri Lanka which was held on 6th and 7th August 2016.[357] Following this, the Centre for Policy Alternatives published a document to analyse the result of the conference which details the opinion and recommendations of the Provincial Councils individually.[358] All the Provincial Councils individually mentioned that the decisions of the National Government influence the policies of the Provincial Councils. Western Province also mentioned that the Chief Minister experiences various political challenges in the exercise of his power. Western Province also mentioned that policies regarding the Provincial Councils are made by the national government without consulting the Provincial Councils.[359] Uva Province recommendations specify that the national plans of the central government interferes the plans of the Provincial Councils. This recommendation also specifies certain policies of the national government (for example: Divineguma, Maganeguma and Samurdhi).

This document indicates that the members of the Provincial Councils are not satisfied with the powers and responsibilities they possess. Also, confusion between the national government and the Provincial Councils is likely to emerge. That may result in the failure of the government administration causing difficulties for the people in Sri Lanka. As a result, it is clear that the legal provisions introduced to Sri Lanka for the purposes of power sharing comprising of the 13th amendment to the Second Republican Constitution of 1978 and the Provincial Councils Act No. 42 of 1987 are not effective.

Section II – Fundamental Principles of Power Sharing

4.2 (a) Introducing the elements

As the introductory section demonstrated, a power sharing mechanism can be described as a political solution implemented in a multicultural society which divides the governmental responsibilities among different communal groups to represent rival political

[357] Above n 341, 5.
[358] Ibid 24 – 39.
[359] Ibid, 26.

interests in the government. Since there is no consensus among scholars on power sharing, for the purpose of this research, the Oxford English dictionary definition for power sharing is used. It provides two definitions for power sharing: "the sharing among rival political interests of governmental responsibilities" and "a policy for such sharing agreed between parties or within coalitions."[360] Through these definitions it is clear that power sharing refers to a mechanism which shares the responsibilities of the government between different groups who have different interests.

As pointed out above, the Sri Lankan power sharing mechanism allows certain governmental responsibilities to be shared between rival political interests. Also, considering the thirteenth amendment as an agreement, the Tamils and the Sinhalese have agreed to the provisions in the thirteenth amendment. However, it has been shown above that such mechanism has failed to address the political demands of the minority Tamils in Sri Lanka. Hence, it is clear that simply sharing the government responsibilities will not provide a successful power sharing mechanism. The problem lies with the mechanism by which the power sharing system is implemented. The work of Lijphart is helpful in this regard.

Lijphart in his 2002 article, "Negotiation Democracy versus Consensus Democracy: Parallel Conclusions and Recommendations" introduces four major elements of power sharing: (a) executive power sharing, (b) group autonomy (c) proportional representation and (d) mutual veto. Out of these four, Sri Lanka has implemented proportional representation. Before examining the unimplemented principles, this chapter first examines the established proportional representation principle.

Sri Lanka is amongst the oldest democracies in South Asia.[361] It implemented universal suffrage as early as in 1931.[362] Since then, Sri Lanka resorted to a whole variety of electoral mechanisms. Initially Sri Lanka had 'first past the post' electoral system and single transferable vote system.[363] First past the post is the simplest form of voting process implemented in a number of commonwealth countries including Canada and the United

[360] *Shorter Oxford English Dictionary* (Oxford University Press 5th Ed, 2002) 2, 2308.
[361] With the implementation of limited franchise system in 1910, Sri Lanka implemented democratic features. Since then several democratic elements were implemented including universal franchise in 1931 and Westminster Parliament system in 1948.
[362] Department of Education Sri Lanka, *History – Grade Ten Text Book* (Sri Lankan Government Press 2000) 29.
[363] Sugath Alahakoon, *Deshapalana Widyawe Moolikaanga (Sinhala) – Fundamentals of Political Science'* (Imprinta International, 2nd ed, 2006), 191-194.

Kingdom.[364] This mechanism allows each voter to vote for his/her preferred candidate. The candidate who receives the highest number of votes in a particular electoral division is elected. Single transferable vote system is an extended version of this system. Under single transferable vote system voters can nominate their preferences in the poll as first priority and second priority.

The weakness of these systems is that, it does not represent the majority opinion. The reason is that sometimes the highest number of votes does not mean that the candidate received the majority of the total number of votes. For instance, in a particular electoral division named XYZ with ten voters, three candidates (A, B and C) compete for one seat of that electoral division. One candidate (A) receives four out of ten votes. The other six votes have been casted equally upon the remaining two candidates (three for B and three for C). The majority of votes (six out of ten) are against the candidate A. However, since he received the highest number of votes, under first past the post electoral system he is elected as the member for the legislature. Even under the single transferable vote system, when there is only one seat allocated per electoral division, there is no chance for the second preference. Hence, this type of a situation tends to ignore the majority opinion.

This system also challenges the fair representation of minority ethnic groups in the legislature. Put simply, in the above example, B is a candidate from a minority group who has received three out of ten votes. This means the minority people have casted 3% of votes in favour of their group. In the ten proceeding electoral divisions also, the minority Tamil candidates received a similar response in the election making around 30% votes in favour of their group. However, since they have not received the highest votes in a particular electoral division their representation in the legislature is 0%.

Given that Sri Lanka implemented this system, the minority groups have received a minimum representation in the legislature.[365] As a result, under the 1978 constitution Sri Lanka has implemented a proportional representation system. Proportional representation is a system where different political parties gain seats in proportion to the number of votes they receive. Lijphart identifies that proportional representation is associated with "multiparty systems, coalition governments and more equal executive-legislative power

[364] Pippa Norris, Choosing Electoral Systems: Proportional Representation and Mixed Systems' (1997) 18(3), *International Political Science Review,* 298.
[365] This is clear from the Tamil representation in the Parliament.

relations."[366] Since different groups representing different ethnic groups can be elected, the end result of proportional representation is the split of power into separate groups. As a result, it is more likely that a multi-party system will be formed with a coalition cabinet.[367]

Take the Sri Lankan case study for example. There are 225 seats allocated in the Sri Lankan Parliament.[368] Out of the 225, 196 members are elected by the people in a general election and the remaining 29 are elected as National List MPs in proportionate to the number of votes each party receives in the general election.[369] To form a government, one political party requires at least 113 seats in the Parliament. The statistics indicate that in the current Parliament, the 225 members are represented by six political parties.[370] 106 members from the United National Party, 95 members from United People's Freedom Alliance, 16 from Illankai Tamil Arasu Kadchi (minority Tamil party) and 6 seats for People's Liberation Front. One seat is equally won by the Eelam People's Democratic Party (minority Tamil party) and Sri Lanka Muslim Congress (minority Muslim party).[371]

As per these statistics, the proportional representation system has allowed a multi-party system. Also, none of the parties have received the required number of seats (113) to form a government. As a result, the United National Party and United People's Freedom Alliance has established a coalition government. This system has also resulted in substantial representation for minority groups. Because of this reason, it is clear that Lijphart's analysis (that proportional representation allows a multi-party system with coalition governments with minority representation) is correct.

This is also clear from the Sri Lankan Parliament Election results of 2001. In this election the United National Party received 109 seats, People's alliance received 77 seats, People's Liberation Front received 16 seats. Tamil National Alliance, a minority Tamil party has received 15 seats in the Parliament whilst 5 other seats were received by a minority Muslim party, Sri Lanka Muslim Congress. Another minority Tamil party Eelam People's

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[366] Arend Lijphart 'Constitutional Choices for New Democracies' (1991*)* 2 (1), *Journal of Democracy* 73.

[367] Arend Lijphart 'Negotiation democracy versus consensus democracy: Parallel Conclusions and Recommendations' (2002) 41, *European Journal of Political Research* 108.

[368] Research Directorate: Immigration and Refugee Board of Canada, 'Country Fact Sheet – Sri Lanka' (Country Factsheet, Immigration and Refugee Board of Canada, 2006) 4.

[369] The Sunday Times, '*Is the National List Serving its Purpose?*' (11th May 2014) The Sunday Times <http://www.sundaytimes.lk/140511/news/is-the-national-list-serving-its-purpose-98853.html>.

[370] Parliament of Sri Lanka, 'Party Composition of the Parliament' (28th March 2018) Parliament of Sri Lanka < http://www.parliament.lk/en/members-of-parliament/party-comp>.

[371] Parliament of Sri Lanka, '*Directory of Members' (*no date) Parliament of Sri Lanka < https://www.parliament.lk/en/members-of-parliament/directory-of-members/?cletter=A>.

Democratic Party has received 2 seats in the parliament whilst one seat is won by the Democratic People's Liberation Front which is also a Tamil minority party. Given that none of the political parties have received 113 seats to form a government, the United National Party and People's Alliance formed a coalition government.[372]

Even though a coalition cabinet brings the disadvantage of a weak government, it allows the creation of a multi-ethnic government. As a result, different opinions representing different ethnic groups are represented in the government and in the legislature. In particular, Lijphart emphasizes the importance of a coalition government via a proportional representation mechanism in an ethnically divided community. Whilst giving specific reference to the opinion of the minority ethnic groups, working with majority ethnic parties in the coalition government will also bring the advantage of working together with different ethnic groups.

Thus, it is clear that proportional representation is an established principle in Sri Lanka. Hence, this section of the chapter does not make any recommendation or further analysis on the established principle. Instead, this chapter now turns to evaluate the rest of the principles proposed by Lijphart and other scholars.

4.2. (B) Executive Power Sharing

From the above analysis, it is clear that proportional representation tends to form a legislature with minority representation. As a result, minority groups have the opportunity to express their interests in Parliament. However, for the purpose of reconciliation minority representation in the legislature is inadequate. With 16 seats in Parliament Tamil minority groups faces difficulties in passing a bill in the Parliament. Hence, they cannot demand the executive to act on their behalf. Further, under the Provincial Council system the Governor acts as a watchdog and restricts their interests. Put simply, governors are appointed by the President (of the national government) and act like his representative. The constitution itself provides that the Governor stays at the President's 'pleasure'. With a wide array of powers placed in the Governor's hands, the President tends to take control of the Provincial Councils. As a result, the President appoints a Governor who is trustworthy to him. There were several incidents that displayed autocracy of the President in the appointment of the

[372] Inter-Parliamentary Union Archive, *'Sri Lanka Parliamentary Chamber: Parliament Elections held in 2001'* Inter-Parliamentary Union Archive < http://archive.ipu.org/parline-e/reports/arc/2295_01.htm>.

Governor. One such incident is the appointment of military Governors to the Northern and Eastern provinces in Sri Lanka.

In 2014, President Rajapakse appointed G.A. Chandrasiri, a retired Major General of the Sri Lankan army as the Governor of the Northern Province.[373] Chandrasiri was the Chief of Staff of the Sri Lankan Army. This appointment has been criticised by the people of the Northern Province and representatives of the Northern Provincial Council.[374] Despite the displeasure of the people and the representatives of the Northern Province, this appointment has been done twice in the recent history. Similarly, a retired Rear Admiral of the Sri Lankan Navy, Mohan Wijewickrema, was appointed (twice) as the Governor of the Eastern Provincial Council by President Rajapakse.[375] Wijewickrema was alleged for issuing circulars only in Sinhalese language despite the minority dominance in the Eastern Province.[376] Also, for the minor grade to senior grade vacancies in the Eastern Provincial Council, Wijewickrema has only appointed only Southern Sinhalese despite the availability of suitable minority candidates in the Eastern Province.[377]

Appointing a military personal to a position in the civil administration is controversial. This displays the interest of the ruling government in increased militarisation. Also, it demonstrates that the government intends to continue a military presence in a minority dominant area even after the end of a civil war. As a result, military involvement is expected in civil administration. This would further deepen the inequality problem. Put simply, Northern and Eastern Provinces have a minority dominance and have been deeply affected by the civil war.[378] For every other province where the Sinhalese are the dominant, a civil Governor was appointed. However, for the provinces with a minority dominance, a

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[373] Sri Lanka Army, *Major General Chandrasiri (Retd) Assumes Duties as New Governor for North* (no date) Sri Lanka Army: Defenders of the Nation < http://www.army.lk/news/major-general-chandrasiri-retd-assumes-duties-new-governor-north>.

[374] Sri Lanka Brief, *Appointment of Military Governor: President Rajapaksa Broken his Promise to CM Vigneshwaran* (12th July 2014) Sri Lanka Brief < http://srilankabrief.org/2014/07/appoinment-of-military-governor-president-rajapaksa-broken-his-promis-to-cm-vigneshwaran/>.; Hiru News, *NP Governor should be Removed; CM. Vigneshwaran says at the Inaugural PC Meeting* (25th October 2013) Hiru News: Sri Lanka's Number One News Portal < http://www.hirunews.lk/69965/update-video-np-governor-should-be-removed-cm-vigneshwaran-says-at-inaugural-pc-meeting>.

[375] Tamil Net, *Rajapaksa Strengthens Blueprint on Sinhalicisation in East* (24th December 2011) Tamil Net <https://www.tamilnet.com/art.html?catid=13&artid=34729>.

[376] Ibid.

[377] Ibid.

[378] Colombo Telegraph, *Maha Sangha Protests Appointment of First Transgender Governor* (26th March 2016) Colombo Telegraph < https://www.colombotelegraph.com/index.php/maha-sanga-protests-appointment-of-first-transgender-governor/>.

military governor was appointed. This demonstrates two different ways the national government treats the majority and minority communities. It also creates the public impression that the national government does not wish to unite with them. This is clear from the statement made by the Chief Minister of the Northern Province: "the ruling government is not willing to work united with the Tamil community."[379]

Secondly, the appointment of the (former) Governor of the Central Province was controversial. Central Province, a province with a major Buddhist dominance, tends to preserve the Buddhist culture. President Sirisena (current), in 2015 appointed, Niluka Ekanayake a transgendered as the Governor of the Province. Buddhist monks representing the Temple of the Tooth Relic have showed their displeasure against this appointment mentioning that "the Governor has to work with Buddhist monks and participate in religious ceremonies at the Temple of the Tooth Relic."[380] As a transgender person, Buddhist monks do not wish to accept her participation in the religious activities. Also, news reports indicate that she was convicted for several offences. For instance in 1997, when he was a man, he was pleaded guilty for impersonation.[381] Also in 1998, he was charged for forgery.[382] Hence, people did not want her to be appointed as the Governor of the central province and demanded another appointment. However, President Sirisena did not respond to these demands.

In addition to this, the legislative enactments of the national Parliament also limit the powers of the Provincial Councils. For this reason, even though Tamil parties have the opportunity to make claims in the parliament, they cannot proceed forward with actions, since they do not have executive power.

In order to address this problem, Lijphart proposes a second principle - power sharing in the executive arm of government.[383] Here, Lijphart analyses that adequate alternative measures should be taken to allow minority parties to access the executive power.[384] However, Lijphart is not clear on the alternative mechanism which provides access for the minority groups. Instead, in his 2004 article, "Constitutional Design for

[379] Sri Lanka Brief, above n 372.
[380] Colombo Telegraph, above n 376.
[381] Ibid.
[382] Ibid.
[383] Arend Lijphart, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands* (University of California Press, 1st edition 1968).; Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven: Yale University Press, 1st edition, 19.
[384] Ibid.

Divided Societies" he provides several examples to analyse this principle.[385]

Belgium's constitutional provisions providing equal access for Flemish speaking and French speaking Belgians in the Cabinet is Lijphart's first example. Since 1970s, Belgium experienced a language division (French and Flemish).[386] As a solution for this, the Belgium constitution specifies that the Cabinet of Ministers should consist equally with Flemish speakers and French Speakers. As a result, both groups have equal representation in the executive. That means the executive power is shared between the two main communal groups. This example is useful to identify Lijphart's principle on executive power sharing. However, there are certain difficulties in the application of this mechanism to the Sri Lankan problem. This is because of the demographic differences between Sri Lanka and Belgium. In Belgium, 59% of the total population are Flemish speakers whilst 40% are French speakers. Also, the French and Flemish speakers are well established throughout the state. However, in Sri Lanka this case is different. Whilst a majority of Tamils are restricted in the Northern and the Eastern regions of the island, the Sinhalese population is dominant in other regions. Also, Sri Lankan Tamil population is around 11.1%, and 74.9% of the total population are Sinhalese. For this reason, it is difficult to implement a 50-50 Tamil and Sinhalese cabinet in the government.

The second example provided by Lijphart (in the same article) is much more relevant to the application of Sri Lankan case study. Lijphart takes the South African case study and explains that any political party (despite ethnic representation) who receives at least minimum 5% of the seats in the Parliament has the right to participate in the cabinet on a proportionate basis.[387] This provision is similar to the proportional representation in selecting members to the Parliament, where candidates are elected to the Parliament in proportion to the votes they receive. For instance, 16 seats out of 225 are represented by Illankai Tamil Arasu Kadchi in the current Sri Lankan Parliament. If the South African mechanism is implemented, 36% of the members of the Cabinet should come from parliamentarians from this party. Accordingly, in a Cabinet of 50 Ministers, at least 2 members should be represented by Illankai Tamil Arasu Kadchi. Accordingly, there would be

[385] Arend Lijphart, above n 381.

[386] L. Huyse, The Language Conflict in Belgium: a Sociological Approach (1975) <https://soc.kuleuven.be/centre-for-political-research/publicaties-luc-huyse/bestanden/pdf-hoofdstukken-in-boeken/1975-The%20language%20conflict%20in%20Belgium_1.pdf>.

[387] Arend Lijphart, above n 381, 99.

a mandatory provision to allow the minority parties to be part of the executive arm of government.

This system can be observed in Northern Ireland as well. In Northern Ireland, the main political parties can become members of the permanent coalition government.[388] Decisions affecting Northern Ireland are taken by this coalition government which is represented by all the political parties. In that sense, this mechanism allows the executive power to be accessed by every party. Given that this is one major feature in representative democracy, every ethnic group is given the right to take part in the decision-making process of the government.

In addition to these two methods there are several other ways to allow minority groups to access executive power. Implementing a vertical power sharing mechanism is one such way. In this regard, the notion of horizontal and vertical power sharing must be defined.

Horizontal power sharing requires the state power to be shared among different government organs.[389] This is similar to the separation of power principle found in the constitutional law theories. Accordingly, the state power is vested in three institutions: the executive, the legislature and the judiciary. There are several situations where the horizontal power sharing mechanism goes beyond this level and allows a dual power sharing system. This system establishes two institutions within one organ of the government. The dual executive system in Sri Lanka is an example. The Sri Lankan constitutional mechanism allows a dual executive system vesting the executive power in two layers: (a) the President and (b) the Prime Minister followed by the Cabinet of Ministers.[390] Through this, the executive power is devolved to a certain level. However, this system does not ensure that the executive power is shared between local councils (vertical) which is fundamental to reconciliation. Rather, it allows the same horizontal power sharing principle - separation of powers - among the legislature, the executive and the judiciary.

The vertical power sharing principle is a mechanism that allows executive power to be shared among different levels of the government. For instance, power vested in the executive is shared between the regional institutions allowing minority groups to access

[388] Ibid.

[389] Benjamin Graham, 'Michael Miller and Kaare Storm, Power Sharing and Democratic Survival' (Working Paper 141, Institute for Advanced Studies Vienna, 2016), 9.

[390] Second Republican Constitution, 1978 (Sri Lanka), Article 30, 31, 40.

national executive power. This method creates different layers in the government with executive power. For example, Lijphart's proposal calls for a provincial government system with executive power in addition to the central government. Accordingly, Lijphart proposes that the national government should not be the only authority that enjoys executive power, but also, the provincial governments and local institutions.

In Sri Lanka, regionalism is allowed by the establishment of the Provincial Councils under the 13th amendment. The problem with this mechanism is (as explained in the first section) that it restricts the power of the Provincial Councils to a large extent. Hence, for a successful mechanism these restrictions should be properly addressed. The third section to this chapter addresses these concerns.

4.2. (C) Group Autonomy

Multicultural societies often experience difficulties in state governance. The first section in this chapter demonstrated that implementation of proportional representation and executive power sharing tends to mitigate this difficulty to a certain extent. However, in deeply divided societies, despite proportionality and executive power, minority groups often experience violent treatment and injustice. Several incidents in Sri Lanka such as the 2014 'Aluthgama' incident and 2018 'Kandy' incident are clear examples of his problem.

In June 2014, a Sinhalese Buddhist group named 'Bodu Bala Sena' attacked a minority Muslim community in Aluthgama.[391] As a result of this incident, 4 people died and 80 others were severely injured.[392] However, the government took little initiative to investigate and prosecute the responsible persons.[393] A similar incident took place in Kandy in March 2018 where militant Buddhist mobs engaged in violent activities by beating up Muslims and destroying their houses, businesses and personal property.[394] Sinhalese majority politicians were alleged to be behind the incident.[395] However, the politicians have

[391] BBC News, *Sri Lanka Muslims Killed in Aluthgama Clashes with Buddhists* (16th June 2014) BBC News <http://www.bbc.com/news/world-asia-27864716>.
[392] Ibid.
[393] Ibid.
[394] Gulf News, *Sri Lanka should not Tolerate Ethnic Riots* (7th March 2018) The Gulf News Editorial < https://gulfnews.com/opinion/editorials/sri-lanka-should-not-tolerate-ethnic-riots-1.2184288>.
[395] Sunday Observer, *Political Hand behind Communal Unrest – Deputy Minister Ranjan Ramanayake* (3rd June 2018) Sunday Observer < http://www.sundayobserver.lk/2018/03/11/features/political-hand-behind-communal-unrest-deputy-minister-ranjan-ramanayake>.

not been taken to custody.[396]

These incidents demonstrate that even with a strong minority representation in the national Parliament, justice is rarely provided to these groups. This is mainly because the majority community often undermines the values of the minority ethnic groups. As a solution to such problems, group autonomy should be implemented. Lijphart explains that this freedom may include the freedom to run their own internal affairs and may extend to different forms of self-government. It may result in a minority group separating from the national government to a certain extent and taking decisions for its own survival.[397]

This principle was further examined by recent scholars. Robert Dahl is amongst them. He argued that, "no person is, in general, more likely than yourself to be a better judge of your own good or interest or to act to bring it about."[398] This means that, specific groups should run their own internal affairs since external groups cannot be 'a better judge' for their interests. Put simply, in Sri Lanka there are several ethnic groups including the Tamils and the Sinhalese. As per Dahl's analysis, the Sinhalese cannot judge the interests of the Tamil groups and vice versa. As a result, particular focus should be given to autonomy of the groups. Autonomy transfers the group identity to a commodity where the leaders of that particular group must compete to gain political power.[399] For instance, Arabs in Israel, Muslims in Kashmir, Estonians in Russia and Malaysians in China seek to engage in politics as distinctive groups that have important collective interests.[400]

In applying this principle to the (above) Aluthgama incident, it is clear that Muslim groups have an interest in the welfare of their own group. The Sinhalese majority government took little initiative to prosecute the responsible people. Yet, if a mechanism had been implemented with group autonomy, the Muslim group could have independently prosecuted the responsible people. Thus, it is clear that group autonomy is important to be implemented in a multicultural society. Implementing group autonomy in Sri Lanka is practically possible. This is because, the Sri Lankan legal system allows different legal systems according to different ethnic and cultural factors. For instance, Muslims have the different legal system of Shariah Law whilst the Tamils in the Jaffna region enjoying

[396] Ibid.
[397] H.J. Heintze, On the Legal Understanding of Autonomy in M. Suksi (ed.) in *Autonomy: Applications and Implication*, (Cambridge: Kluwer Law International, 1st edition, 1998), 7.
[398] Robert Dahl, *Democracy and its Critics* (Yale University Press, 1st Ed, 1989), 99.
[399] Ibid.
[400] Bhikku Parekh, 'Theorizing Political Theory' (1999) 27 (3) *Journal of Political Theory,* 72.

Thesawalamai legal system (property law). Also, Sinhalese in the Kandy region enjoy the Kandyan Law

4.2 (D) Mutual Veto

Even though the executive power is shared and some measure of autonomy is given to particular ethnic groups, sometimes the minority groups may not benefit sufficiently. Discrimination and killings of Rohingya Muslims in Myanmar and Rakhine Buddhists in Bangladesh are good examples of this problem.[401] Buddhists being the majority, they acted at the expense of the minority Rohingya Muslims. Subsequently violence emerged in Myanmar despite Rohingya Muslims being recognised as a communal group, having proportional representation and the opportunity to participate in politics. As a result, for a successful power sharing mechanism, Lijphart proposes a fourth principle which is Mutual Veto.

Mutual veto means requiring consensus of every group on major decisions taken by the majority ethnic group. In a heterogeneous society, where one major ethnic group rules over other ethnic groups, mutual veto plays a significant role in reconciling these communities. In this kind of situation, the majority must consider the opinion of the minority groups. If the minority decides the other way, the majority cannot proceed alone with their decision. As Lijphart proposes, mutual veto ensures political protection to vulnerable groups.[402] Even though the concept of mutual veto is a historical principle that had also been discussed by Montesquieu and Madison, in a practical sense, this concept has been rarely tested. Only very occasional situations have established provisions for mutual veto. For the period of 1975 and 2010, only 11 states included specific provisions for mutual veto in their constitutions. This includes: Belgium, Bosnia–Herzegovina, Burundi, Canada, Cyprus, Iraq, Macedonia, Serbia and Montenegro, Sudan, Yugoslavia.[403]

However, Stephan Hall argues that Dagestan, a Republic of Russia, has successfully

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[401] Wa Lone, *Myanmar Sends Hundreds of Troops to Rakhine as Tension Rises: Sources* (11th August 2017) Reuters < https://www.reuters.com/article/us-myanmar-rohingya-military/myanmar-sends-hundreds-of-troops-to-rakhine-as-tension-rises-sources-idUSKBN1AR0ZN>.

[402] Megha Ram and Kaare Wallace Strøm, 'Mutual Veto and Power-sharing' (2014) 17(4), *International Area Studies Review* 343, 344.

[403] Ibid.

implemented the mutual veto principle in its constitutional structure.[404] In terms of Article 81 of the Constitution of Dagestan, members of the legislature, the People's Assembly have the ability to use a veto power if any legislation affects any ethnic group. This kind of a principle ensures that legislations passed does not negatively affect the existence of any other ethnic group. In 1956 the Sinhalese majority government lead by Prime Minister S.W.R.D. Bandaranaike enacted the Sinhalese Only Act. This is a discriminatory Act affecting the interest of the Tamil minority groups. However, there was no provision to defeat this Act. Under a system with mutual veto principle on place, if any statute of the Parliament negatively affects the status and key interests of another group, that group can veto the discriminatory statute. Subsequently, when the Sinhalese Only Act is implemented, the Tamil minority groups could have vetoed this Act. By this way, interests of the minority groups can be protected to a considerable extent.

Summarising Lijphart's proposal, proportional representation ensures that voting rights are given to distinctive groups and their representatives will represent their opinion in the legislature. For better enforcement of their rights, principles like autonomy and mutual veto should be implemented. In this way distinctive groups can make a stronger contribution to domestic politics. Now, the problem is whether these groups can have national level representation through these principles. Scholars like Dahl, Ian O'Flynn and Tom Hadden argue that having proportional representation, mutual veto and autonomy are necessary but not sufficient for power sharing. They propose some more elements amongst which intrinsic equality is prominent.

4.2 (E) Intrinsic Equality

Intrinsic equality is premised on the principle that everyone is equal because they naturally possess some rights and freedoms. These rights and freedoms are not external to human beings since they are naturally given. The Preamble of the Universal Declaration of Human Rights embodies this concept. It provides that, "whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[405] This idea is originally derived

[404] Stephan GF Hall 'Dagestan's Consociational Model? The Potential for Regional Consotiationalism in Russia', (Working Paper No 85, European Center for Minority Issues, 2005), 11.
[405] Charter of the United Nations, Preamble.

from John Locke's Second Treatise of Government.[406] Here Locke analyses that every man/woman has equal right to his/her natural freedom and that is not subject to the will or authority of another person.[407] Locke analyses that this natural freedom shall also include political power, where no other person can influence the political power without the consent of that person.[408] The reason is that every person is intrinsically equal to each other and no one is intrinsically superior to any other.

Put simply, take two Sri Lankan individuals; one Tamil and one Sinhalese. As per the notion of intrinsic equality both these individuals are given equal and inherent political rights. As a result, both of them can effectively participate in domestic politics and express their own political views. That does not stop there. The political interest of the Tamil individual is not subject to the political interest of the Sinhalese individual. Despite the interest of the Sinhalese's political view, the Tamil individual can have his own political interest. For instance, if the Tamil individual wants to establish Tamil government through a free and fair election, the Sinhalese individual cannot intervene in his interest by stopping him from voting or facing an election. This is mainly because the notion of intrinsic equality takes the political interest of both of these individuals to the same level.

Locke's analysis does not specify intrinsic equality in terms of group or communal relations. However, legal and political scholars like Robert Dahl[409] and Ian O'Flynn[410] extend Locke's analysis on intrinsic equality. Both of agree that intrinsic equality is displayed in the democratic processes when the principle of 'equal consideration of interests' is adhered to.[411]

Now the question is whether intrinsic equality can be applied in group context. The large scholarship on human rights propose that application of individual rights for groups is a complicated question. Some scholars analysed that a right borne by a group is not essentially a human right attached to individuals.[412] They also argue that group rights are potentially a threat to the individual rights. For instance, they claim that the reason why

[406] John Locke, *Two Treatises of Government* (York University, a New Edition, Vol. 5, 1823) 54, 322.
[407] Ibid.
[408] Ibid, 348.
[409] Robert Dahl, *Democracy and its Critics* (Yale University Press, 1st Ed, 1989), 99.
[410] Ian O'Flynn above n 289; Donald L. Horowitz, 'Ethnic Power-Sharing and Democracy: Three Big Problems' 2014 25 (2), *Journal of Democracy, 21*.
[411] Robert Dahl, *Democracy and its Critics* (Yale University Press, 1st Ed, 1989), 86.; Donald L. Horowitz, 'Ethnic Power-Sharing and Democracy: Three Big Problems' 2014 25 (2), *Journal of Democracy, 21*.
[412] Peter Jones 'Human Rights, Group Rights, and People's Rights' (1999) 21(1), *Human Rights Quarterly* 80.

human rights have been implemented is because individuals should be protected from specific groups.[413] As opposed to this, some other scholars argue that human rights can apply in both individual and collective forms. They argue that human rights may de divergent from group rights but both of them are united by the same values.[414]

The collective conception of Joseph Raz provides a reasonable justification on individual rights and collective rights.[415] Raz analyses that to have a right is to have an interest and it conceptualizes others (who are external to that specific group) to have a duty.[416] Both individuals and groups may hold rights under this concept. That is, when a group of people with joint interests provides a reasonable justification for them to have a right, others owe a duty against that group. Put simply, the Tamil minority group holds the interest of protecting their identity as a group. So does the Sinhalese ethnic group. Hence, others who are external to the specific group hold a duty for that group. For instance, the two groups are responsible for their counter groups.

Accordingly, intrinsic equality can be applied to communal groups.[417] Here, Locke's definition for intrinsic equality (for person) should be applied to groups. In that sense; "every group has equal right to their natural freedom and that is not subject to the will or authority of another group."[418] When this principle is applied in the Sri Lankan context, neither the Tamil minority nor the Sinhalese majority is superior to the other. Rather, both groups have equal rights in the participation of politics and both the groups are equally recognised in the institutional and constitutional structure of Sri Lanka. Also, the principles suggested above (executive power sharing, autonomy and mutual veto) ensure that the power sharing mechanism is successfully implemented.

Given these factors, power sharing is examined as an important concept in domestic governance. It satisfies the political and social needs of victims of the conflict. Implementing a power sharing mechanism would advance reconciliation in societies that are deeply divided on ethnic or social factors. The ideas put forward by Lijphart are important for power sharing. Executive power sharing and group autonomy in particular are essential

[413] Ibid, 82.
[414] Ibid 80.
[415] See the concept developed by Josph Raz in The Minority of Freedom (1986) pages 165-216, 245-263 and 207-209.
[416] Above n 409, 83.
[417] Ibid.
[418] Locke's analysis for intrinsic equality refer, John Locke, *Two Treatises of Government* York University, a New Edition, 5, (1823) 54, 322.

elements to mitigate ethnic violence.[419] Also, power sharing requires the divided groups to jointly rule and make decisions by consensus. Hence autonomy is important. However, these principles are not sufficient for a successful power sharing mechanism. Hence, some recent additions to power sharing principles including intrinsic equality shall also be imposed in the Sri Lankan power sharing mechanism.

Section III – Recommendations

The above analysis demonstrated that the Sri Lankan power sharing mechanism has some serious drawbacks. Some of the fundamental principles of power sharing have not been implemented in the Sri Lankan mechanism. Also, it gives prominence to one ethnic group causing structural violence. The Provincial Councils have limited powers and these powers have also been restricted by laws of the national Parliament. National Parliament also overrides legislation affecting the Provincial Councils without proper consultation of the Provincial Councils. Besides, the position of the Governor (for each province) acts like a watchdog of the national government and restricts the work of the Provincial Councils. For a successful power sharing mechanism that addresses the Sri Lankan reconciliation problem these weaknesses must be properly addressed. This section introduces three main recommendations that would help addressing these concerns: (a) appointing a Governor from the Provincial Councils, (b) implementation of a consultative committee to strengthen consensual decision making, and (c) implementation of a permanent minority seat for the minority Tamils in the government.

These recommendations are derived from the principles laid out by Lijphart in his writings and adjusted to address the specific problems in the Sri Lankan power sharing system. First, appointing a Governor from the Provincial Councils allows Lijphart's first power sharing principle, executive power sharing. As stated in the previous section, minority groups should be given the opportunity to appoint the members of their executive. Even though the existing mechanism in Sri Lanka allows such a process, the position of the Governor restricts this variable. To overcome this problem and to allow a strong power sharing principle this thesis recommends the appointment of the Governor from the Provincial governments. To allow mutual veto, this thesis proposes the implementation of a

[419] Ayesha Zuhair 'The Power-sharing Experience in Northern Ireland and Sri Lanka' (2008) 4 (1), *International Public Policy Review,* 48.

consultative committee to strengthen the consensual decision making. As the previous section demonstrated, to allow strong power sharing consensual decision making is essential. The implementation of consultative committees allows this to happen. Third, implementation of a permanent minority seat for the Tamils in the government allows power sharing principles of executive power sharing, group autonomy, mutual veto and intrinsic equality. This chapter now turns to examine these recommendations.

4.3. (a) Appoint a Governor from the Provincial Councils

Due to the reasons specified above in the first section to this chapter, it is clear that the President of the national government has full discretion to appoint a Governor of his choice and that leads to increased involvement of the President in the Provincial Councils. To avoid these weaknesses, it is recommended to adopt an alternative mechanism to appoint the Governor. In 2005, the Hindu – a prominent newspaper in India recommended an alternative mechanism for India which arguably would also be useful in Sri Lanka.[420] The Hindu recommended the appointment of a Governor from the State Legislature (similar to Provincial Councils in Sri Lanka). Accordingly, people of each state should appoint candidates to their respective State Legislations. A Sub-Committee consisting of the Prime Minister of the national government and Chief-Minister of each province nominate three people from the State Legislature. The Prime Minister and the Vice President of the national government make the final selection from the three nominees for the President to make the appointment. The whole process is subject to judicial review and the person appointed shall be an 'eminent person'. This means that the person should have experience as a successful administrator, with some minimum educational qualification.[421]

If this mechanism is implemented in Sri Lanka, it would mean that the President of the national government would have less influence in the Provincial Councils. In particular, the President would not have discretion in the selection of the Governor. Instead, the people will play a role in selecting a suitable candidate since it is the people who elect candidates to the Provincial Councils. Also, the Governor will come from the Province of his residence and not from any other province. Hence, the Governor's autocratic appointments

[420] P.R.V. Raja, *Why not Elected Governors* (15th March 2005) The Hindu <http://www.thehindu.com/op/2005/03/15/stories/2005031500261900.htm>.
[421] Ibid.

from other provinces can be avoided. In this way, the Governor is not responsible to the President of the national government. Rather, the Governor is responsible to the people of the Provincial Council and to the Prime Minister and the Chief Minister of the Provincial Council. This mechanism can help address the problem of the Governor acting as a 'watchdog' of the national government.

4.3. (b) Implementation of consultative committees

As examined in the first section, several ministries and institutions at the national and provincial levels have power in relation to the same subject matter. This leads to confusion between the national government and Provincial Councils. There is no system for consultation between the Provincial Councils and national government. Also, despite having some power sharing, the existing laws and regulations restrict independent and autonomous work by the Provincial Councils. Therefore, the Provincial Councils are largely ineffective. As a solution to this problem it is recommended to implement a consensual decision-making process between the national government and the provincial governments at least to the decisions affecting the provincial governments.

The purpose of this process is to discuss the work of the national government and Provincial Councils to make decisions that affect Provincial Councils. This can be done by implementing a consultative committee for every Ministry of the Provincial Councils. The members of the consultative committee should be the Ministers of the Provincial Councils for that specific subject and the Minister of the national government who is responsible for that subject. Put simply, as examined elsewhere in this chapter, in every Provincial Council there is a Ministry for Agriculture. In the national government there is also a Ministry for agriculture. A consultative committee for agriculture should be implemented with the membership of the Minister for Agriculture in the national government and nine Provincial Council Ministers responsible for Agriculture. The chairman of the consultative committee should be held by the Minister of the national government and the Provincial Council Ministers should be the members of the committee.

These consultative committees should be given certain duties and responsibilities affecting the projects of both the national government and Provincial Councils. Decisions of the national government, including cabinet papers, ministerial circulars and Parliamentary legislation should be presented at the consultative committee and get the opinion of the

Ministers of the Provincial Councils. Also, the Ministers of the Provincial Councils must discuss their plans with the Minster of the national government and Ministers representing other Provincial Councils. In this way, the national government and the Provincial Councils are aware of the work of each other's work. That helps to address confusion in the government structure. Also, this method helps to use the consultative committees as a forum of providing information to the Ministers of the Provincial Councils. When the consultative committees have been implemented and the Ministers of the national government meet with the Ministers of the Provincial Councils on a regular basis, there is an opportunity for the Minister of the national government to inform them of decisions affecting the provincial governments. On the other hand, the national government is aware of the concerns of the people of the Provinces and effective solutions can be implemented to people's problems.

4.3. (c) Implementation of a permanent minority seat in the government

The final recommendation is to implement a permanent minority seat in the national executive government. The Manning Devonshire constitution of Sri Lanka, which existed from 1924 to 1931, had given specific constitutional protection for minority ethnic groups by allowing a permanent minority seat in the legislature.[422] Constitutional reforms after the Donoughmore reforms removed this provision, and members of the legislature were appointed by way of a general election. The proposed mechanism of implementing a permanent minority seat is similar to this provision, but extends it to the executive level. This means that the constitution allows Tamil minority groups to play a permanent role in the executive in addition to the legislature.

As the second section to this chapter demonstrated, allowing the minority groups to access national executive power is fundamental to power sharing. However, this is rarely achieved with South Africa, Northern Ireland and Belgium as rare examples. For the purpose of reconciliation, it is recommended that a permanent minority Ministry be established in relation to Tamil affairs. For this, the South African model could be followed. As specified above every party who takes at least 5% of seats in the Parliament can represent the executive in South Africa. If this model is followed Tamil minority parties can have at least 2-

[422] Department of Education Sri Lanka, *History – Grade Ten Text Book* (Sri Lankan Government Press 2000,) 29.

3 seats. Accordingly, the individual representing the Tamils who takes the highest number of votes in the general election is proposed to be appointed as the Minister for this Ministry. In such terms, despite the political party or political interest of the government there is a permanent seat allocated to the minority group. In that way, any decision affecting the Tamil minority is taken by this Ministry. Since the person who takes the highest votes at the general election (from the Tamils) is appointed as the Minister, the political right of the Tamils to exercise power is ensured. Given that the Ministry is permanent (however the Minister is not), the appointee attempts to protect his Ministry by serving to the people to whom he was responsible. By way of a permanent minority seat in the executive, autonomous decisions affecting their ethnic identity can be taken. In the meantime, it also allows mutual veto, since the decisions affecting the Tamils taken in consultation with the proposed Ministry.

Conclusion

The Sri Lankan political situation does not allow the minority Tamil group to effectively participate in politics. Their political participation is minor, and their political demands have not been effectively addressed. One way of addressing this problem is through the implementation of an effective power sharing mechanism. The existing power sharing mechanism in Sri Lanka has some serious drawbacks. It has not accepted some fundamental principles of power sharing including executive power-sharing, group autonomy, mutual veto and intrinsic equality. Besides, some legal and practical restrictions have limited the existing mechanism. Governors of the Provincial Councils have a wide array of powers and acts as a 'watch dog' of the national government. The national government also enact statutes through the national Parliament restricting the powers of the Provincial Councils. Moreover, there is no consensual decision-making process between the national government and the Provincial Councils. Hence, people often experience serious difficulties. To avoid these weaknesses, three main recommendations are made. The first is to implement an alternative mechanism to appoint the governor in Provincial Councils. In this way the President's influence over the Provincial Councils can be avoided. Implementation of consultative committees, the second recommendation, allows the two governments to discuss prior to decisions being taken. Confusion between policies can be avoided in this way. The third recommendation proposes the establishment of a permanent minority seat

in the executive. This recommendation will avoid the national governments decisions affecting the minority groups.

Chapter 5

Economic reconstruction in Sri Lanka

Introduction

Post-conflict societies encounter severe economic problems.[423] Any civil war tends to permanently affect the productivity and earnings of the individuals,[424] thereby intensifying poverty and inequality in a given society.[425] In post-conflict Sri Lanka, poverty, economic inequality and unemployment are rampant. These problems mainly affect the Tamil minority living in the war affected areas of the North and East of Sri Lanka. For instance, the Household Income and Expenditure Survey 2016 (most recent dataset) provides that the poverty rate (Headcount Index) in the Tamil dominated Eastern Province is at 7.3% and the Northern Province is at 7.7%.[426] Compared to this, the poverty rate in the Sinhalese dominated Western Province remains at 1.7% and in the Southern Province at 3.0%.[427] Mulathivu, a war affected area, experiences a poverty rate of 28% whilst the national poverty rate remains at 6.7%.

There are unequal economic conditions between the Sinhalese majority living in the non-war affected areas and Tamil minority living in the war affected areas. The Tamil minority in the war affected areas have fewer educational qualifications compared to the Sinhalese majority who have not been affected by war.[428] As some reports issued in 2002 and 2003 made clear, one out of three school aged children in the North and the East were not attending schools and during the civil war the government forces use the schools as military bases.[429] The school aged children in 2003 are today of working age. Due to fewer education opportunities, these individuals have reduced capacity to engage in many occupations.

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[423] Bureau for Crisis Prevention and Recovery, 'Post-Conflict Economic Recovery: Enabling Local Ingenuity' (*Crisis Prevention and Recovery Report 2008*, United Nations Development Programme 2008), XVII.

[424] Rubiana Chamarbagwala and Hilcias E Moran, 'The Human Capital Consequences of Civil War: Evidence from Guatemala' (2011) *Journal of Development Economics* 41, 42.

[425] In Rwanda, for instance, genocide resulted in further 20% of the population moving into poverty. Also, terrorist violence reduced the growth rate of the economy of Basque region of Spain compared to other regions. See, Quinn et al 2007 and Justino and Verwimp (2006), and Chen et al 2008

[426] Department of Census and Statistics, 'Household Income and Expenditure Survey 2016' (HIES Final Report, Ministry of National Policies and Economic Affairs Sri Lanka, 2016), 41.

[427] Ibid 42.

[428] Birgitte Refslund Sorensen, 'The Politics of Citizenship and Difference in Sri Lankan Schools' (2008) 39 (4), *Anthropology & Education Quarterly, 425*.

[429] Avis Sri-Jayantha, *Impact of War on Children in Sri Lanka (*January 2003) Sangam <http://www.sangam.org/ANALYSIS/Children_1_28_03.htm>.

The overarching research aim of this thesis is to propose a successful reconciliation mechanism to Sri Lanka. Previous sections of this thesis introduced economic reconstruction as a principle element to establish a successful reconciliation mechanism. This chapter analyses the factors that restrict economic reconstruction and introduces a suite of governmental reform proposals that can be utilized to initiate economic reconstruction in Sri Lanka and thereby to achieve reconciliation. To address economic reconstruction, the causes of poverty, economic inequality and unemployment must be addressed. The first concern of this chapter is to identify the causes of the poverty, inequality and unemployment in the North and the East.

First, after the end of the civil war, Sri Lankan society neglected and excluded ex-Tamil Tiger members. As a result, ex-Tamil tiger members do not have access to employment opportunities and are economically disadvantaged. Second, the military remains suspicious of ex-Tamil Tiger members and tracks their movements. This restricts the ex-Tamil Tiger members from having access to employment opportunities, because employers are not willing to have military officials around their businesses. Third, disparities in education is a main reason for the lack of employment prospects of most of the Tamils in the war affected regions. Finally, persisting social norms discourage individuals from doing manual jobs and these are also often extremely poorly paid.

After recognizing the reasons for poverty, inequality and unemployment in the North and the East of Sri Lanka, the second section analyses possible solutions. First, to tackle social exclusion, the establishment of the position of an anti-discrimination commissioner with appropriate laws is proposed. Unlike many other countries, Sri Lanka does not have an anti-discrimination commissioner. As a result, despite having some laws to fight discrimination, the enforcement of these laws is problematic. Second, the number of military personnel in the North and the East must be significantly reduced. This section demonstrates that the current military occupation in the North and the East of Sri Lanka is heavy and unnecessary. Reducing the number of military personnel from these areas can ease the military intervention in Tamil people's lives. To address the larger problem of unemployment, the minority Tamils in the war affected areas should be included in the domestic economy. For this, the capabilities of individuals must be developed. Also, these individuals must be given credit facilities to encourage self-employment. In that way, they will be given the opportunity to put their capabilities into practice.

Official data related to most of the problems raised in this chapter is not available. Also, media and other news reports do not give sufficient attention to these problems. As a result, most of the information used in this chapter is based on personal communications, information shared through social media, and web information shared by the diaspora community.

Section I –Reasons for poverty, inequality and unemployment

5.1 (A) Social exclusion of the ex-Tamil tigers

There is little information publicly available regarding the lives of former ex-Tamil tiger members. However, the social exclusion of the former Tamil Tigers is well known throughout the country.[430] Social exclusion of the ex-Tamil tiger members results in increased unemployment. This is evident from the speech of the then opposition leader, R. Sampanthan to the Parliament on 27th May 2017.[431] In this speech, Sampanthan emphasized that the North Eastern youth are excluded from having access to job opportunities. Most of the North Eastern youth were the members of the Tamil Tigers because the Tigers forced many children and youth to join them.[432]

For example, there are claims that families of the female ex-Tigers are unwilling to accept them back.[433] These families believe that there would be security issues for the rest of the family if the women joined their families again. Not only the families but also the whole society discriminates against female ex-Tigers. For instance, Jeya Kamalrajan, an 18-year-old female ex-Tamil Tiger, explained that no one wants to offer her a job because she is an ex-Tiger member.[434] Another 19-year-old ex-Tamil Tiger Nalini, mentioned that the society 'distrusts her' simply because she is an ex-Tiger member.[435] For this reason, ex-Tamil Tigers experience difficulties in reintegrating with the society. The society simply refuses their presence and refuses to provide them with any employment opportunity.

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[430] Home for Human Rights, 'Female ex-combatants of Sri Lanka – Literature Review', 2013 *Home for Human Rights* < https://www.scribd.com/document/212025604/Lit-review-Female-ex-combatants-of-Sri-Lanka> 1.
[431] R. Sampanthan, *Unemployed Graduates; The Worst Affected are Tamil Youth' (*27th May 2017) Colombo Telegraph, <https://www.colombotelegraph.com/index.php/unemployed-graduates-the-worst-affected-are-tamil-youth/>.
[432] Human Rights Watch, 'Living in Fear: Child Soldiers and the Tamil Tigers in Sri Lanka' (2004) *Human Rights Watch* 16 (13), 4-7.
[433] Home for Human Right, above n 430.
[434] The Inside Story on Emergencies, *Fewer "I do's" for Former Female Rebels* (23rd February 2011) The Inside Story on Emergencies, <http://www.irinnews.org/report/92017/sri-lanka-fewer-i-dos-former-female-rebels>.
[435] Ibid.

Such individuals who have been excluded from the society on occasions committed suicide. Indeed, some news reports indicate that the suicide rate after the war has significantly increased.[436] Within the male ex-Tiger member group also, alcohol consumption has considerably risen.[437]

5.1 (b) Military intervention in ex-Tamil Tigers' lives

Due to several reasons, military intervention in the North and the East resulted in increased unemployment and poverty. First, the Sri Lankan Army has taken over some jobs in construction and agriculture that are usually done by civilians. This restricts civilians having access to jobs. Military engagement in civilian duties is both a legal and a moral problem. Morally, military engagement in civilian work is not acceptable. Legally, s.23 of the Army Act of Sri Lanka authorizes the President of the country to allow military personnel to engage in civilian jobs when there is an immediate threat of deprivation of essentials to the people of Sri Lanka.[438] In addition to this, s. 12 of the Public Security Ordinance allows the President to use the military to maintain public order when the police is inadequate.[439]

However, the military has massively engaged in non-military work in the North and the East beyond these provisions. For instance, the 2015 Performance Report of the Sri Lanka army explains that several construction, reconstruction and earth work projects were undertaken by the Sri Lanka army.[440] This includes an open-air theatre at the University of Moratuwa, a sports arena and merchandise building at Royal College, an indoor stadium at Sirimavo Bandaranyaka Vidyalaya, a railway restaurant at Diyathauyana park, and a renovation of the National Museum.[441] The most affected are the minority Tamils in the North and the East. This is because, people in the North and the East usually undertake manual jobs including construction and agriculture due to their lack of skills. When the military undertakes construction projects, opportunities for these workers from the North and the East are restricted. On the other hand, engagement in these types of construction work are not 'immediate threat of deprivation of essentials' to be approved under the s. 23

[436] Daya Somasundaram, *A Lost Generation of Tamil Youth* (25th October 2015) The Sunday Times <http://www.sundaytimes.lk/151025/sunday-times-2/a-lost-generation-of-tamil-youth-169317.html>.
[437] Ibid.
[438] *Army Act No 14*. 1949 (Sri Lanka), Section 23.
[439] *Public Security Ordinance* 1947 (Sri Lanka), Section S.12 (1).
[440] Sri Lanka Army, '2015 Annual Performance Report' (Annual Report, 2015) 12 -13.
[441] Ibid.

of the Army act. Hence, the military engagement in civilian jobs are legally and morally unjustifiable.

Secondly, agriculture, which remains as a significant source of income for Northerners,[442]is restricted due to the increased military intervention. On the one hand, the Sri Lankan army runs and manages six large agricultural farms in the war affected areas.[443] This includes, Kandakadu farm, Manik farm, Nachchikuda farm, Udayarkattukulam farm and Yala Palatupana farm.[444] As a result, opportunities for civilians to access agricultural jobs is limited. Furthermore, after the initial military capture of the North and the East from the Tamil Tigers in 2009, the military has not returned large areas of land to their original owners. As a result, many individuals do not have land to commence or continue agriculture.

An infographic issued by the Sri Lanka Campaign for Peace and Justice explains the extent to which the military has extended its work in civilians' lives. This explains that the military owns a ferry service, 180-acre farm, 11 hotels, many restaurants, 2 whale watching trips, 2 airlines, 3 cricket stadiums and 1 golf course.[445] This infographic describes that the military has taken over many civilian activities in the North.

The government of Sri Lanka does not provide reliable statistics related to the military occupation in the North Eastern lands. However, several news reports have established that civilian lands in the North and the East to a large extent are still under the military occupation. The Tamil Guardian newspaper, for instance, revealed that 54,000 acres of private land in Jaffna is occupied by the military.[446] People for Equality and Relief in Sri Lanka (PEARL), an NGO in the war affected area of Sri Lanka, in another news report mentioned that 30,000 acres of land in Mulativu area is under the hands of the military.[447] This report also mentioned that there is at least 1 soldier for every 2 civilians in Mulativu

[442] Department of Census and Statistics, 'Sri Lanka Labour Demand Survey 2017' (Survey, Ministry of National Policies and Economic Affairs, 2017).
[443] Human Rights Watch, above n 428.
[444] Ibid.
[445] Sri Lanka Campaign, *The Sri Lankan Military Owns* Sri Lanka Campaign for Peace & Justice <https://www.srilankacampaign.org/wp-content/uploads/2013/03/SRI_infographic_fig3_B-1-300x212.jpg>.
[446] Tamil Guardian, *5400 acres private land in Jaffna still under military occupation* (4th July 2017) <https://www.tamilguardian.com/content/5400-acres-private-land-jaffna-still-under-military-occupation>.
[447] http://pearlaction.org/publication/normalising-the-abnormal-the-militarisation-of-mullaitivu-district/

district.[448] For this reason, people in the North Eastern Provinces do not have access to sufficient agricultural lands.

Thirdly, there are claims that the government military track ex-Tamil Tigers. This has become a serious problem in Tamil society since it restricts the opportunity for these individuals to participate in socio-economic activities. The Sri Lankan government has undertaken several projects to rehabilitate ex-Tamil Tigers with the intention of socializing them to the Sri Lankan society.[449] After rehabilitation, ex-Tamil Tigers must register with, and constantly report to, the Civil Affairs Office which is under the control of the government military.[450] However, there is no legal authority or statute stipulating that the ex-Tiger members must report to the office in a given time frame.[451] When these individuals are registered under the Civil Affairs Office and constantly reporting, the office keeps track of these individuals. Sometimes, the military maintains surveillance around the individuals. That reveals to the society that these individuals were once involved in the Tamil Tigers. For this reason, employers refuse to offer them employment opportunities because the employers are afraid that there would be subject to increased Sri Lankan government military intervention at the place of employment when ex-Tiger members are recruited.

Some ex-Tamil Tigers have claimed that the Sri Lankan government forces treat them differently from other members of the society.[452] Some social media posts shared by individuals claim that the Sri Lankan army often requests the national identity documents and sometimes questions them unexpectedly. However, similar situations do not exist in other parts of the country dominated by the Sinhalese.

In support of this, Thisarani Santhirabose, a former Tiger member whose family lives in Canada, claims that it is difficult for her to do agricultural work due to discrimination by the military. She claims that her livelihood was agriculture and she often need to buy tools and equipment required for her livelihood. But whenever she visits the city to buy tools and equipment, she will be interrogated and questioned by the military.[453] This is because the

[448] http://pearlaction.org/publication/normalising-the-abnormal-the-militarisation-of-mullaitivu-district/
[449] Official records with reference to the rehabilitation projects are unavailable.
[450] Shamila, *Female ex-combatants of LTTE in post-war Sri Lanka* (2th February 2012) Ground Views <http://groundviews.org/2012/02/24/female-ex-combatants-of-ltte-in-post-war-sri-lanka/>.
[451] Ambika Satkunanathan, *Jaffna and the Vanni today: The Reality beneath the rhetoric* (17th March 2011) Ground Views <http://groundviews.org/2011/03/17/jaffna-and-the-vanni-today-the-reality-beneath-the-rhetoric/>.
[452] Ibid.
[453] Personal communication to the author.

authorities know her to be a registered ex-combatant.[454] For this reason, she often finds it difficult to buy the equipment. An anonymous interviewee mentioned that despite good education, her husband cannot get a job simply because "he was in the LTTE."[455]

5.1 (c) Disparities in Education

Disparities in education is another reason for poverty, unemployment and inequality in the North and the East Sri Lanka. A report published in 2003 states that one third of school aged children in war zones in Sri Lanka have not been to a school. In support of this, Elroy Gabrielle, the former resident representative for UNICEF, in 2002 stated that one in five children in Sri Lankan war zones do not attend schools.[456] TamilNet in 2002 has proven this by reporting that 150 schools in war zones had army camps established in them. Besides, the Tigers have used the children as soldiers. This is proven by a report issued by the Human Rights Watch in 2004.[457] This report mentions that there were 3,516 new cases of recruiting child soldiers for the period from February 2002 to October 2004.[458]

Each of these factors demonstrate that in the former war zones there were limited opportunities available for the school aged children to receive an education. From 2003 to 2018, 15 years have passed and the school aged children in 2003 are now at a working age. Without education, it is highly unlikely for them to have many employment opportunities. This is one major reason for the youth in the war zones to have increased unemployment. Currently also, even after the end of the war, only some small initiatives were taken to improve education opportunities in the war affected areas.[459]

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[454] The Economist, *Thousands of victims of Sri Lanka's civil war remain unaccounted for* (16th March 2017) The Economist <https://www.economist.com/asia/2017/03/16/thousands-of-victims-of-sri-lankas-civil-war-remain-unaccounted-for>.

[455] International Crisis Group, 'Sri Lanka's Conflict-affected Women: Dealing with the Legacy of War' (Asia Report No 289. International Crisis Group, 28th July 2017)

[456] Avis Sri-Jayantha, *Impact of War on Children in Sri Lanka (*January 2003) Sangam <http://www.sangam.org/ANALYSIS/Children_1_28_03.htm>.

[457] Daya Somasundaram above n 436.

[458] Ibid, 3.

[459] For instance, Bandula Gunawardana, the then Minister for Education in the national government (2010-2015), initiated a project named 'Mahindodaya.' Under this project the Ministry of Education aimed to develop the infrastructure in schools in Northern Province in 2014. However, this project has only selected schools grouped as 1AB and 1C. Accordingly, schools grouped as Type II and Type III have not been included under this project. Records indicate that in the Northern Province there are around 983 schools graded as Type II and Type III whilst there are only 196 schools graded as 1AB and 1C. Amongst this 196 schools also, only 90 schools were selected to develop the infrastructure facilities. There are no statistics available with reference to the progress of the project. Even if it had been successful, only 46% of the schools in the 1AB and 1C grade

Due to disparities in education, economic reconstruction in the Northern Province has been restricted. Education increases the level of capability of individuals and that can help to make new employment opportunities. Given that the war has restricted children from having access to education opportunities and that the current allocation of funds for education in North Eastern provinces is low, individuals in the North Eastern regions lack required capabilities. This can be the reason for most of the war victims to be unemployed.

5.1 (d) Persisting social norms

Persisting social norms[460] in Sri Lanka often undermine manual jobs and encourage people to search for administrative or general office work.[461] As a result work in agriculture, fishing and animal husbandry in the school curriculum are not given prominence and are poorly paid.[462] However, due to the war the Tamil minority in the North and the East have not had the opportunity for education. That restricts their opportunity of getting a white-collar job which often require better education qualifications. For this reason, when members of the Tamil minority take manual jobs, the Sri Lankan society often undermines them.

This social stratification is linked with the caste system in Sri Lanka which existed since it was a feudal society. At the time of the feudal system, different castes were given different occupations and only higher castes received top level jobs.[463] When the Free Education Policy was implemented in 1945, lower caste people received the benefit of education which opened doors for better jobs. But over time the Sri Lankan social norms began to undermine the lower jobs.

In the North and the East there are not many white-collar jobs available. As per the Labour Demand Survey Report (2017), out of 9,321 job vacancies available in the Northern Province, only 1,495 jobs belong to the administrative/ general office work. All other occupations belong to some manual or agricultural jobs like sewing machine operators,

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Northern Province were benefitted whilst Type II and Type III schools have not been considered under the project.

[460] The Stanford Encyclopedia of Philosophy defines social norms as *'the informal rules that govern behaviour in groups and societies'* see Stanford Encyclopedia of Philosophy, *Social Norms* (24th September 2018) Stanford Encyclopedia of Philosophy, <https://plato.stanford.edu/entries/social-norms/>.

[461] Lakshman, WD 'A Holistic View of Youth Unemployment', in ST Hettige and Mayer, M (eds) *Sri Lankan Youth Challenges and Responses*, Colombo: (Freidrich Ebert Stiftung Foundation, 2002), 13, 18.

[462] Ibid.

[463] Ibid.

hand packers, cleaners etc. Comparatively, the number of white-collar/administrative and general office work in Western Province are high.[464] For instance, occupations like systems analyst, bank tellers, civil engineers, office supervisors are available in Western Province but are not in the Northern Province.

From these figures, two points can be identified. Firstly, the North and the East where Tamils live have high unemployment rates compared to other provinces. Secondly, out of the available jobs, the North and the East have more manual jobs and fewer white-collar jobs. The second point demonstrates that the Sinhalese majority has access to more white-collar jobs than the Tamil minority. Thus, it is clear that the existing economic structure in Sri Lanka is not equal and does not allow equal opportunities for every citizen.

To address the concerns raised in this section, the chapter now turns to examine the possible solutions that could effectively bring economic reconstruction to Sri Lanka.

Section II – Addressing the Concerns

5.2 (A) Enacting anti-discrimination laws

Ex-Tamil Tigers are socially and economically excluded and are less privileged compared to the Sinhalese majority. Also, the Sinhalese majority government has made several discriminatory laws against them. These include the Sinhalese Only Act 1956 that made the Sinhalese language the official language of Sri Lanka and the provisions in the First republican Constitution 1972 which made Buddhism the official religion. These enactments resulted in the social and economic exclusion of the Tamils from Sri Lanka. To address this concern of social and economic exclusion, anti-discrimination laws should be enacted.

Currently, the constitution of Sri Lanka prohibits discrimination against 'race, religion, language, caste, sex, political opinion, place of birth or any such grounds.'[465] However, the constitution itself gives the foremost place to Buddhism and emphasizes it as the duty of the state to protect and foster Buddhism.[466] This provision privileges the majority Sinhalese Buddhists and that is clearly discriminatory against the minority Tamils. For this reason, there is a confusion regarding the equality principle in Sri Lanka. Because, whilst one part of the Constitution giving priority for one religion, another part prohibits

[464] Department of Census and Statistics, 'Sri Lanka Labour Demand Survey' (Final Report, Ministry of National Policies and Economic Affairs Sri Lanka, 2017).
[465] Second Republican Constitution, 1978 (Sri Lanka) Article 12.
[466] Second Republican Constitution, 1978 (Sri Lanka) Article 9.

discrimination against religion and other grounds. This comes together with ethnic and racial discrimination because of the ethno-nationalism linked with Sinhalese-Buddhists and Tamil-Hindus.

To address this problem, anti-discrimination laws on racial and religious grounds should be enacted. One model that follows such laws is Australia. In Australia, discrimination on the basis of age, disability status, race and sex are prohibited and has separate statutes for each of these categories.[467] To ensure that these laws are enforced, the government established an independent statutory authority the Australian Human Rights Commission. Each state and territory also have anti-discrimination legislation and independent statutory enforcement bodies.[468] Also, a formal complaint procedure for any incident exists. Comparatively, Sri Lanka does not have laws against discrimination. Hence, this chapter proposes the enactment of comprehensive anti-discrimination laws with the position of an independent anti-discrimination commissioner in Sri Lanka.

5.2 (B) Reducing the military from the North and the East

The next concern raised in this chapter is the increased military intervention in civilians' lives in the North and the East. To address this concern, the government must take initiatives to remove army camps from the North and the East while releasing the lands to the Tamil people in these areas. This was requested by many political parties and interest groups from the government. In 2016, for instance, Sri Lanka Muslim Congress, a hardline main Muslim political party in Sri Lanka, requested the government to withdraw the army camps from the North and the East.[469] The leader of the Sri Lanka Muslim Congress, Rauff Hakeem, further demanded that the properties which were occupied by the military must be given back to the people.[470]

However, in a media statement released on 15th July 2018, the Sri Lanka Army declared that it would not close any army camp in the North.[471] Controversially, President

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[467] *Age Discrimination Act* 2004 (Cth); *Racial Discrimination Act* 1975 (Cth); *Sex Discrimination Act* 1984 (Cth).
[468] Australian Federation Disability Organisation, <http://www.afdo.org.au/resources/state-anti-discrimination-boards/>.
[469] Ians, *Sri Lanka's Islamic party calls for removing excess army camps from Northern areas* (13th June 2016) First Post <https://www.firstpost.com/world/sri-lankas-islamic-party-calls-for-removing-excess-army-camps-from-northern-areas-2832698.html>.
[470] Ibid.
[471] Colombo Page, *Sri Lanka Army will not remove any army camps from North as rumoured* (15th July 2018) Colombo Page News Desk <http://www.colombopage.com/archive_18B/Jul15_1531664582CH.php>.

Sirisena in November 2017 mentioned that the, "lands not needed for the three armed forces at present have already been returned to the people in the North and East, and in the future also more lands under those conditions will be released to the people."[472]

Under these circumstances, the most flexible method to resolve this issue is first to release the official records regarding the military occupation in the North and the East. Next, the government must release data as to what extent the military occupation in the North and the East is settled and the need of military occupation in the area. One soldier per two citizens is huge and that must substantially be decreased.

5.2. (D). Development of the capabilities

As explained above, economic reconstruction requires the generation of new income sources. Even though the government generates new income sources, if those sources do not match with the capabilities of people, these individuals do not have the opportunity to participate in these jobs. A study of child soldiers has shown, for example, that in Uganda male youth who were recruited to the military forces received less education which gave them no opportunity to join skilled jobs after the end of the civil war.[473] This is the same situation that is happening in Sri Lanka: the victims of war do not have the opportunity to participate in the available jobs due to fewer capabilities. As a result, the economic reconstruction initiative is less effective. Hence, capabilities of the minority Tamils in the North and the East of Sri Lanka must be developed.

For example, Mulathivu is a war affected area in the Northern Province in Sri Lanka. People in this area have a low literacy rate since they did not have access to educational opportunities. If the government generates new employment opportunities which require the candidates to have higher education qualifications, Mulathivu residents will not benefit from such initiatives. Hence, despite having employment opportunities, unemployment rates will not be reduced. For this reason, the economic reconstruction mechanism must provide better education and training initiatives to develop the capabilities of the people.

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[472] Tamil Guardian, *Sri Lankan President – army camps will not be removed from North to affect national security* (13th November 2017) Tamil Guardian <https://www.tamilguardian.com/content/sri-lankan-president-army-camps-will-not-be-removed-north-affect-national-security>.

[473] Christopher Blattman and Jeannie Annan, 'The Consequences of Child Soldiering' (2007) 92 (4), *The Review of Economics and Statistics* 882-898.

The 2014 education reforms of France provide some examples of how this could be achieved. These reforms aimed at developing and securing career paths of individuals. For this, the government increased the investments of businesses that provided vocational training. These initiatives have widely accepted the right to training. As a result, individuals who seek employment were given access to some form of training to obtain a qualification. The responsibility of providing the training was vested in regional councils. Accordingly, the key players of training for the unemployed were the regional councils.[474]

This system can be applied in Sri Lanka as well. Put simply, the 2017 Labour Report identifies that the highest number of occupations in the Northern Province are for Sewing Machine Operators (5,700 vacancies). Also, as per the latest data, the largest export industry in Sri Lanka is textile and clothing.[475] The government expects to earn around US$8.5 billion by 2020 which is an increase of around US$3 billion from the current amount.[476] When the Tamil minority in the war affected areas is able to participate in this economic activity, they will be benefitted in having better job prospects. As explained elsewhere in this thesis, economic development paves the way for reconciliation.

5.2 (E). Provision of credit facilities

When the capabilities of the individuals are developed with training and education opportunities, these individuals must be given the chance to commence their own business. This can be done by allowing credit facilities to the capable individuals. The large scholarship on economic development has demonstrated that allowing credit facilities can foster rural development.[477]

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[474] European Centre for the Development of Vocational Training, *France – 2014 – A year of reform for vocational education and lifelong learning* (26th February 2015) European Centre for the Development of Vocational Training <http://www.cedefop.europa.eu/en/news-and-press/news/france-2014-year-reform-vocational-education-and-lifelong-learning>.

[475] Sanika Sulochani Ramanayake and Chandana Shrinath Wijetunga, 'Rethinking the Development of Post-War Sri Lanka based on the Singapore Model' (Working Paper No. 2017-0009, Indira Gandhi Institute of Development Research, July 2017) 14; Sri Lanka Export Development Board, *Sri Lanka Targets US $8.5 Billion in Apparel Exports Earnings by 2020* (10th March 2015) Sri Lanka Export Development Board <http://www.srilankabusiness.com/blog/apparel-exports-earnings-by-2020.html>.

[476] Sri Lanka Export Development Board, *Sri Lanka Targets US $8.5 Billion in Apparel Exports Earnings by 2020* (10th March 2015) Sri Lanka Export Development Board <http://www.srilankabusiness.com/blog/apparel-exports-earnings-by-2020.html>.

[477] Daniela Lohlein and Peter Wehrrheim, 'The Role of Credit Cooperatives in Rural Russia' (Gloros Policy Papers, German Institute for Economic Research 2003) 2.

Residents in the war affected areas often have difficulties in accessing credit facilities. Firstly, conditions implemented by banks and financial institutions can exclude them from obtaining credit facilities.[478] Put simply, most of the banks in Sri Lanka require a minimum account balance to maintain a bank account. Some banks maintain a minimum balance of 1,000 Sri Lankan rupees which is more than what the people invest on food for about a week. Even though maintaining a bank account brings some advantages in terms of economic inclusion, rural villagers have to invest their own money just to open a bank account. This results in the exclusion of the poor from accessing the banking and finance services.[479]

Secondly, financial institutions require specific identity requirements to access their service. This may also result in excluding the war victims from having access to credit facilities. Especially, after thirty years of war, people may not have access to their identity documents. Some documents may have been destroyed by the war. Also, some people may have not had the opportunity arrange their identity documents. For instance, if a mother in the war affected area gave birth to a child, she might not have had the opportunity to visit a government institution to do the necessary documentation to obtain a birth certificate. For this reason, most of the victims of war do not have access to identity documents.

Due to these reasons, Sri Lanka does not offer many opportunities for the victims of war to access credit facilities. Hence, a successful model should be utilized. One of the most successful credit facilities was initiated by Mohammed Yunus to alleviate poverty. This project was initiated in 1976 initially as 'Bank of the Poor' and then as 'Grameen (rural) bank' microfinance system. Approximately 85% of the population in Bangladesh live in rural areas with less economic prospects.[480] The premise of this project is not to provide individuals with a basic bank loan/credit facility, but to develop the human capital by prioritizing education, savings and technology.[481] This project identified particular rural areas throughout Bangladesh and established a network of bank branches.[482] Credit offices

[478] Raja Babu, Madhusudana Rao and Vissapragada Srinivas, 'Performance of Rural Credit Schemes: Initiatives of Financial Inclusion for the Development of Rural Economy' (2014) *International Manager Journal on Management*, 9(3), 20.
[479] Ibid.
[480] Abu Elias Sarker, 'The Secrets of Success: the Grameen Bank Experience in Bangladesh' (2001) *Labour and Management in Development Journal* of Asia Pacific Press of Australian National University 2 (1) 3.
[481] Concept Paper on the Bank of the Poor- Grameen Bank Microfinance System. < http://www.persga.org/Files/Common/Socio_Economic/BankPoor_Concept.pdf>
[482] Ibid.

of these branches visit the designated area and make the villagers aware of the project. A group of five individuals who has a commitment to income-generation but does not have the opportunity of generating the income due to less capital are invested. The receivers of the loan are considered as members of the Grameen Bank project.[483] It was expected that these members repay the loan from the income they generate from their new employment. They were given a six-week period to start repaying the loan which can be settled in 50 weekly installments. This is a considerable time to start repaying the loan and sufficient for the members to repay the loan whilst being benefitted from the income they generate.

The project displayed a number of benefits for the economy of the rural areas throughout Bangladesh. First, individuals who were suffering from poverty were given the opportunity to engage in economic activities. Because of this project, individuals who were working on average six days a month, increased it to an average of 18 days a month.[484] The Grameen Bank project also helped increasing the daily agricultural wages by 30-40%.[485] The contribution of these members to the household income was more than 50%.[486] Within a short period of time, the members of this system were out of poverty.[487] These members then focused on asset building. Grameen bank project supported the individuals who seek asset building by establishing a housing loan plans to the poor. This is due to the understanding that possessing a house results in increased productivity, due to storage and production. As a result, having a house as an asset results in the economic development of the poor. Simply providing a loan or a credit facility is not the focus of the Grameen Bank project. Rather, the project identified the particular capabilities of the individuals and helped them using their capabilities to invest on their future.

When compared to the Sri Lankan case study, particular focus should be drawn to the idea that government loans, even though limited, were provided to the victims of war. However, in allocating these funds, unlike the Grameen bank project the government did not consider the purpose or the capability of the individual. This brought significant problems to the beneficiaries, the government and the institution that provided loan

[483] Mahabub Hossain 'Credit for Alleviation of Rural Poverty: The Grameen Bank in Bangladesh' (Research Report No. 65, International Food Polkicy Research Institute and Bangladesh Institute of Development Studies February 1988); Helen Todd, *Women at the Center – Grameen Bank Borrowers After one Decade* (The University Press Limited 1st ed. 1996).
[484] Ibid.
[485] Abu Elias Sarker, above n 480, 5.
[486] Ibid.
[487] No author, above n 481.

facilities. For instance, Sanmugam Sivalingam a victim of the Sri Lankan civil war in the Northern Province borrowed money to buy a taxi. However, the income he generates from taxi driving is less than the loan repayment amount. Hence, he experiences serious economic difficulties and often goes hungry.[488] This simple example shows that in Sri Lanka a similar strategy like in Bangladesh have not been followed. The loan facility in Bangladesh Grameen Bank Project was allowed to the identified set of groups to invest on their capabilities. For this, specific evidence was required to demonstrate that the group of individuals have specific capabilities and invests money in the industry for which they have specific capabilities.

As explained above, the government has given more focus on exporting clothing. If the government is successful in this policy, there will be an increased opportunity for sewing machine operators. The previous section has proposed the establishment of a mechanism to advance the capabilities of the individuals. Once the capabilities of the war victims are advanced, by allowing credit facilities these individuals have the opportunity to be self-employed. This is because, with sufficient skills these individuals can buy sewing machines to contribute to the domestic economy.

By addressing the above problems and by allowing the victims of war to have credit facilities, economic inclusion can be improved. Furthermore, allowing credit facilities can also address the problem of unemployment in the war affected areas. Put simply, the purpose of providing credit facilities is to support the poor communities who are interested in pursuing self-employment. The government has identified positions that are in high demand in each province. In the Northern Province sewing machine operators are in highly demand. Also, there is a demand for agricultural products and fisheries. By providing credit facilities to support these sectors, new employment can be generated. In that way, the problem of unemployment can be addressed to a certain extent.

Conclusion

Currently Sri Lanka experiences serious economic difficulties related to poverty, unemployment and inequality. The most affected are the Tamil minorities in the North and the East of Sri Lanka. There are several reasons for the rise of poverty, unemployment and

[488] Jason Burke, *Sri Lanka's economic boom fails to erase painful civil war memories* (9th October 2013) The Guardian <https://www.theguardian.com/world/2013/oct/08/sri-lanka-economic-boom-civil-war>.

inequality in these areas. Firstly, when the ex-Tamil Tigers rejoined the society, the society did not accept them or did not offer them employment opportunities. For this reason, ex-Tamil Tigers started facing serious economic difficulties. Secondly, this situation developed when the military intervened in the lives of the ex-Tamil Tigers. The government military kept tracking the movements of these individual with a suspicion that they will reorganize as Tiger members. For this reason, most of the employers refuse to offer them any employment opportunities since they do not wish to have increased military intervention within their place of employment.

Next, the military also took many of the available jobs. Besides, the agricultural lands were occupied by the military. For these reasons, residents in the North and the East had very restricted opportunities to participate in jobs. Thirdly, due to the influence of war, the Tamil minority in the North and the East had very limited educational opportunities. Even after the war, the government's focus on education in the North and the East is low. Hence, disparities in education is a considerable reason for poverty, unemployment and inequality in the North and the East of Sri Lanka. Finally, the persisting social norms that undermines the manual jobs and discourages the individuals from getting into those kinds of work. As a result, people use manual jobs as their last resort.

To address these five main problems that restrict equal economic opportunities, specific solutions have been suggested in this chapter. First, to address the problem of social exclusion of the Tamil minorities anti-discrimination laws must be enacted. For this, the model that is being used in Australia can be utilized. Second, reducing the number of military personnel from the North and the East can help address the problem of increased military intervention in ex-Tamil-tigers' lives. Next, by developing the capabilities of the individuals and by allowing suitable credit facilities, unemployment, poverty and inequality can be reduced.

Chapter 6 – Concluding remarks

Ethnic tension between the Sinhalese and Tamils led to three decades of a civil war in Sri Lanka.[489] Despite the end of the civil war in 2009,[490] ethnic violence still continues[491] and a successful reconciliation mechanism has not yet been put in place.[492] Hence, there is a threat of recurrence of a civil war.[493] The international community has suggested several mechanisms including a truth commission and a hybrid court to enable reconciliation in Sri Lanka.[494] Hybrid courts are designed to bring retributive/ criminal justice to post conflict societies.[495] In contrast, truth commissions mainly focus on restorative justice. Ultimately, both mechanisms are expected to work towards reconciling the divided communities in a post-conflict society. Both of these mechanisms offer some benefits to the transitional justice process. From being a therapeutic process to making a historical explanation of past incidents, truth commissions assist the transitional justice process.[496] Hybrid courts are useful as a proximate justice system to the local population.[497] The criminal justice system aims to deter future crimes. In addition to that, the benefits of both a domestic mechanism and an international investigation is offered by a hybrid court.

The overarching research question of this thesis is to evaluate the extent to which the classical reconciliation mechanisms, such as international criminal courts and truth and reconciliation commissions, can be used to achieve reconciliation in Sri Lanka. Additionally, this thesis examined the possibilities for an additional mechanism to supplement the classical mechanism for reconciliation in order to better achieve reconciliation. The thesis does not propose to exclude any existing mechanism for reconciliation.

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[489] Council on Foreign Relations, *The Sri Lankan Conflict* (15th September 2018) Council on Foreign Relations, < https://www.cfr.org/backgrounder/sri-lankan-conflict>.

[490] Miguel Candela Zigor Aldama, *The Scars of Sri Lanka's civil war,* (6th June 2016) Al Jazeera < https://www.aljazeera.com/indepth/inpictures/2015/12/scars-sri-lanka-civil-war-151221062101569.html>.

[491] Chapter 1 page 4 of this thesis.

[492][492] The Indian Express, *UN rapporteur unhappy over Sri Lanka's reconciliation progress*, (15th September 2018) The Indian Express <https://indianexpress.com/article/world/un-rapporteur-unhappy-over-sri-lankas-reconciliation-progress-4751007/>.

[493] Chapter 2 page 26 of this thesis.

[494] A/HRC/30/CRP.2, Report of the OHCHR Investigation on Sri Lanka, Human Rights Council, 30th Session, Agenda Item 2

[495] Chapter 3 page 45 of this thesis.

[496] Special Report 130, United States Institute of Peace, February 2005, 2.

[497] Chapter 3 page 46 of this thesis.

In answering the proposed research question, this thesis has identified that of the two forms of reconciliation, thick and thin reconciliation, the above-mentioned classical mechanisms such as hybrid courts and truth commissions only focus on thin reconciliation.[498] Hence, despite these benefits, these mechanisms cannot achieve 'thick reconciliation' in a post-conflict society. Moreover, truth commissions, though intended to achieve restorative justice, do not focus on the problem of increased structural violence that results from protracted civil wars.[499] Structural violence involves providing privileges to one communal group and detriments another.[500] This causes antipathy within the detriment group. Also, the excessive time period taken by a truth commission can negatively affect reconciliation.[501] Thus, these mechanisms are important but not sufficient to achieve reconciliation and these mechanisms should be supplemented by an alternative mechanism. For this reason, this thesis developed the hypothesis that, even though classical mechanisms are essential for the realisation of reconciliation, they alone will not be sufficient to achieve reconciliation in a post-conflict third world state.

Thus, the context of the alternative mechanism is crucial. The majority of the contemporary conflicts take place in Third World countries. However, it is doubtful whether the contemporary reconciliation mechanisms represent a Third World perspective. One viable way of understanding the Third World people's perspective on reconciliation is by analysing the Third World Approaches to International Law (TWAIL). From a TWAIL perspective, the key to addressing the reconciliation problem lies with addressing the main concerns of the victims that lead to the emergence of the conflict.[502] This links with the notion of thick reconciliation.

Thick reconciliation requires addressing the root cause of a conflict. Generally, conflicts tend to destroy the governing structure, rule of law and democracy in any given society.[503] Hence, post-conflict societies continue to involve discrimination, marginalisation and rule-of-power. Moreover, conflicts often trigger poverty due to the scale of

[498] Chapter 1 page 6 of this thesis.
[499] Chapter 3 page 41 of this thesis.
[500] Chapter 2 page 25 of this thesis.
[501] Chapter 3 page 44 of this thesis.
[502] Chapter 2 page 20 of this thesis.
[503] UNICEF, The Impact of Conflict on Women and Girls in West and Central Africa and the UNICEF response. (2005) New York.

infrastructure destruction.[504] The existing political and institutional structure in these societies tends to be discriminative towards the minority groups. In particular, post-conflict societies tend to have a higher degree of structural violence owing to the particular social or institutional structures.[505] Thus, thick reconciliation is required addressing the root cause of the conflict and the problem of structural violence.

In answering the first overarching research question this thesis also suggested that, the classical reconciliation mechanisms have different aims, including peace building and trust building. These mechanisms have never considered mitigating structural violence as a common aim. Hence, classical mechanisms often disregard the actual problem that prevents reconciliation. This thesis has argued that to achieve reconciliation increased structural violence should be mitigated. For this reason, this thesis further developed the hypothesis that classical mechanisms are not sufficient for the realisation of reconciliation in a third world state.

Given that the existing reconciliation mechanisms do not address structural violence, this research proposes an alternative mechanism. The proposed mechanism is only an additional mechanism and not a substitute for the traditional reconciliation mechanisms. The capabilities approach, a well-recognised social justice theory, suggests that increased structural violence should be addressed by introducing (a) increased political participation of the victims of the conflict and (b) increased inclusion of victims in the domestic economic process.[506] In addition to these two requirements, the thesis proposes that the reconciliation should happen within a reasonable timeframe.[507] Economic development, and political participation of the victims ensures the establishment of a social structure with equal opportunities for every individual. Timeliness is important because delay in the reconciliation mechanism will result in weakening the reconciliation process and might also result in conflict recurrence. Hence, this mechanism should put in place within a reasonable timeframe.

The second research question developed in this thesis was to identify an additional mechanism that would supplement the classical mechanisms to achieve reconciliation in a

[504] Rubiana Chamarbagwala and Hilcias E Moran, 'The Human Capital Consequences of Civil War: Evidence from Guatemala' (2011) 94, *Journal of Development Economics,* 41, 42.
[505] Chapter 2 page 24 of this thesis.
[506] Chapter 2 page 30 of this thesis.
[507] Chapter 2 page 34 of this thesis.

third world state. In terms of achieving thick reconciliation through mitigated structural violence, the thesis demonstrated certain structural factors that restrict reconciliation in Sri Lanka. Mainly, the Sri Lankan political situation does not allow minority groups to effectively participate in politics.[508] Tamil political participation is minor, and their political demands have not been effectively addressed. In order to achieve thick reconciliation, Tamil minorities - who are heavily affected by the three decades of war and one decade of post-conflict recovery - should be included in the domestic political processes. One viable way of addressing this problem is the implementation of an effective power sharing mechanism.

The current constitutional provisions in Sri Lanka allow power sharing to a certain extent.[509] However, this mechanism has some serious drawbacks. It has not accepted some fundamental principles of power sharing including executive power-sharing, group autonomy, mutual veto and intrinsic equality. Besides, some legal and practical restrictions have limited the existing power sharing mechanism. Governors of the Provincial Councils have a wide range of powers and act like watch dogs of the national government.[510] The appointment of the Governor depends solely on the discretion of the Executive President of the national government. [511] Hence, the Governor tends to please the President by acting upon his orders. [512] National governments have also enacted statutes through the national Parliament restricting the powers of the Provincial Councils. [513] Moreover, there is no consensual decision-making process between the national government and the Provincial Councils. To avoid these weaknesses, three main recommendations are made. The first recommendation is to implement an alternative mechanism to appoint the governors in Provincial Councils. In this way President's influence over the Provincial Councils can be avoided. Implementation of consultative committees, the second recommendation, allows the two levels of government to consult before making decisions. Confusion between policies can be avoided in this way. The third recommendation proposes the establishment of a permanent minority seat for the Tamil minority in the executive government. This

[508] Chapter 4 page 62 of this thesis.
[509] Chapter 4 page 59 and 62 of this thesis.
[510] Austin Fernando, *Governor or Chief Minister* (8th December 2013) The Sunday Leader, <http://www.thesundayleader.lk/2013/12/08/governor-or-chief-minister/>.
[511] Second Republican Constitution, 1978 (Sri Lanka), Article 154 (B) (2).
[512] Austin Fernando, *Governor or Chief Minister* (8th December 2013) The Sunday Leader, <http://www.thesundayleader.lk/2013/12/08/governor-or-chief-minister/>.
[513] Center for Policy Alternatives, Note on the Divineguma Bill (Working Note, Center for Policy Alternatives, 2013) 6.

recommendation will avoid national governments' decisions negatively impacted the minority groups.

Economic inequality between the victims and non-victims of war results in increased structural violence. Tamil victims of the civil war who are the residents of Northern and Eastern provinces experience poverty, unemployment and inequality due to lack of job prospects, infrastructure development and lesser capabilities. [514] This thesis has identified several reasons that cause increased economic difficulties in these areas. One of the main concerns is the social exclusion of ex-Tamil Tigers at their return to the society. Simply, the society did not accept them or did not offer them employment opportunities when they rejoin the society.[515] As a result, ex-Tamil Tigers experience economic difficulties. This was triggered when the military intervened in civilian activities.[516] The military kept tracking the movements of these individuals because of a suspicion that they might reorganize as Tiger members. As a result, most employers refused to offer them job since they are not willing to have increased military intervention within their place of employment.

Members of military took the civilian jobs and continued their occupation of agricultural lands, thereby extending the military intervention in civilian lives. As a result, victims of war in the North and the East have limited job opportunities. Due to the civil war, residents in the North and the East have limited opportunity to obtain a good education. In the post-conflict era also, the government had limited focus on education of the Tamil people in the Northern and Eastern provinces. As a result, there are disparities in education that cause poverty, unemployment and inequality in the North and the East of Sri Lanka. As a result, poverty rates have risen. Finally, the persisting social norms discourage individuals from obtaining manual jobs.

The thesis proposes that the enactment of anti-discrimination laws could help to enhance social inclusion of Tamil minorities. To address the increased military intervention., this thesis proposes that the number of military personnel in the North and the East must be reduced. Furthermore, by providing adequate credit facilities and developing the capabilities of the victims, the problem of unemployment, poverty and inequality can be addressed.

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[514] Home for Human Rights, 'Female ex-combatants of Sri Lanka – Literature Review', 2013 *Home for Human Rights* < https://www.scribd.com/document/212025604/Lit-review-Female-ex-combatants-of-Sri-Lanka> 1.
[515] Chapter 5 page 64 of this thesis.
[516] Chapter 5 page 65 of this thesis.

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